(22)

No. 03-724

Supreme Court, U.S.
FILED
MAR 15 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

F. Hoffmann-La Roche, Ltd., et al.,
Petitioners,

v.

Empagran, S.A., et al.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Foreign Trade Antitrust Improvements Act narrows the Sherman Act's application over the claims of foreign purchasers of a worldwide cartel that has direct, substantial, and foreseeable effects on U.S. commerce.

2. Whether overseas purchasers of a worldwide cartel that is prohibited by the antitrust laws have suffered "antitrust injury" and have "antitrust standing."

RULE 29.6 STATEMENT

Respondent Empagran has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Empagran.

Respondent Nutricion has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Nutricion.

Respondent Windridge is the business name for the business owned and operated in partnership by Cynray Pty. Ltd. and Larkray Pty. Ltd. Both of these companies are proprietary limited companies, all of the shares of which are held by natural persons.

Respondent Stirol has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Stirol.

Brisbane Export Corp. was a respondent at the certiorari stage but has since withdrawn from the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
BRIEF FOR THE RESPONDENTS 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 1
SUMMARY OF THE ARGUMENT 3
ARGUMENT 5
I. Because Global Cartels' Domestic And Foreign Effects Are Inextricably Intertwined, Respondents Prevail Even Under Petitioners' Construction of The FTAIA And Foreign Plaintiffs' Claims Against Such Cartels Furthermore Directly Advance U.S. Interests. 9
A. The Market for Bulk Vitamins Is a Global Market. ... 10
B. The Effects Of Petitioners' Conduct On U.S. Commerce Gave Rise To Respondents' Claims. 11
C. U.S. Interests Are Directly Advanced By Recognizing The Claims Of All Victims Of An Integrated Cartel That Operates In The United States. 13
II. The FTAIA's Jurisdictional Limitation Does Not Apply To Conduct Involving Import Commerce And Thus Does Not Apply To Worldwide Cartels. 19
A. The FTAIA Limits The Scope Of The Sherman Act Solely In Cases Involving Only U.S. Export Commerce. 19
B. The Authorities Cited By Petitioners Actually Support *Respondents'* Reading Of The FTAIA. 23
III. Congress Inserted Clause 2 Merely To Ensure That The Covered Foreign Conduct Must Have An *Anti-Competitive* Impact On Domestic Commerce To Be Actionable Under The Sherman Act. 25

A. The Drafting History, Text, And Structure Of The FTAIA Confirm Congress's Intent To Adopt The *National Bank of Canada* Rule.....27

B. The House Report On Which Petitioners Rely Confirms That Congress Intended To Preserve The Claims Of Overseas Purchasers.....31

IV. As Direct Victims Of Petitioners' Worldwide Cartel, Respondents Have Suffered "Antitrust Injury" And Have "Antitrust Standing." 35

A. Respondents Have Antitrust Standing Even Under Petitioners' Proposed Standards. 36

B. Petitioners' Proposed Standing Rule Is Inconsistent With This Court's Precedents And Congress's Intent. 37

1. Respondents Satisfy The Settled Requirements For Antitrust Standing.....37

2. Congress Declined To Adopt The Restriction On Standing That Petitioners Propose. 41

V. The Other Arguments Of Petitioners' *Amici* Lack Merit. 44

A. The Government's Leniency Program Is Not A Justification for Misinterpreting the FTAIA.....44

B. The Exercise Of Jurisdiction Over A Worldwide Cartel Does Not Offend Comity. 47

CONCLUSION.....50

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Atl. Richfield Co. v. *USA Petro. Co.*, 495 U.S. 328 (1990).....37

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 37

Cargill, Inc. v. *Monfort*, 479 U.S. 104 (1986).....37

Cont'l Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) 13

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Ballard v. *Savage*, 65 F.3d 1485 (CA9 1995) 13
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Vitamins Antitrust Litig., In re., Misc. No. 99-197 (D.D.C. Feb. 18, 2004) 46
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Statutes

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15 U.S.C. 15(a) 2, 35
15 U.S.C. 15(b) 30, 43
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15 U.S.C. 6a(1) 29, 30, 34
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proviso 4, 20, 21, 23, 29, 30, 43

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BRIEF FOR THE RESPONDENTS

Respondents Empagran, S.A., et al., respectfully request that the judgment of the United States Court of Appeals for the D.C. Circuit be affirmed.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix, *infra*, at 1a-2a.

STATEMENT OF THE CASE

1. Petitioners are more than twenty U.S. vitamin producers and distributors and their foreign affiliated companies. J.A. 19-33. Together, they perpetrated "the most pervasive and harmful criminal antitrust conspiracy ever uncovered." Joel I. Klein, Ass't A.G., Speech of Sept. 30, 1999, at 5.[1] This conspiracy – which petitioners named "Vitamins, Inc." – was a "textbook example" of a worldwide cartel. Gary R. Spratling, Dep. Ass't A.G., Speech of Dec. 9, 1999, at 13. By allocating geographic markets amongst themselves and fixing prices, petitioners successfully eliminated competition in the sale of bulk vitamins, reaching agreements "on everything from how much product each company would produce, which customers they would sell it to, and at what price they would sell it." *Ibid.*

The U.S. government's prosecution of petitioners was the crowning achievement of its aggressive pursuit of international cartels in the mid-1990s. Contrary to petitioners' claim that they were charged with "fixing prices of vitamins sold in the United States" (Br. 4), in fact, they were prosecuted here for their "*worldwide* conspiracy to raise and fix prices and allocate market shares for certain vitamins sold in the United States *and elsewhere*" (U.S. D.O.J., Press Release, Department of Justice, F. Hoffman-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel (May 20, 1999) (emphases added)). Petitioners were indicted for, and

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[1] The Table of Authorities provides detailed information on where this and other government speeches are available.

pled guilty to, "a combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of certain vitamins manufactured and sold in the United States *and elsewhere*." Plea Agreement, *United States* v. *F. Hoffmann-La Roche, Ltd.*, No. 3:99-CR-00184 (May 20, 1999).

This suit was filed against petitioners by Procter & Gamble (a U.S. corporation), six of its U.S. and foreign affiliated companies, and foreign companies (respondents here), all of which purchased bulk vitamins "for delivery outside the United States" during the period of the cartel. J.A. 17-19, 58.[2] They sued petitioners in the District Court for the District of Columbia under, *inter alia*, Section 4 of the Clayton Act, which confers a private right of action upon persons "injured in [their] business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. 15(a). The complaint was designated a companion case to ongoing litigation brought by persons who purchased bulk vitamins for delivery in this country.

2. Petitioners moved to dismiss. Notably, they did not invoke doctrines such as comity, conflict of laws, or *forum non conveniens* to show that, assuming jurisdiction exists, the courts should decline to *exercise* that jurisdiction. Instead, they contended that (i) the complaint was subject to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. 6a) and was barred by FTAIA Clause 2's requirement that the effect of the defendants' conduct on U.S. commerce "give rise to a claim under" the Sherman Act; and (ii) respondents lacked standing. The district court agreed with the former contention and did not reach the latter. Pet. App. 48a-52a.

The D.C. Circuit reversed. Pet. App. 1a-39a. The court agreed with the Second Circuit and Judge Patrick Higginbotham (dissenting in the Fifth Circuit) that Clause 2 does not require that "the plaintiff's claim" arise from the effect of the defendants' conduct on U.S. commerce. See Pet. App. 17a-20a. It therefore did not reach respondents' contention that the adverse

[2] The claims of the Procter & Gamble parties have been held in abeyance during this appeal. J.A. 69.

effect of petitioners' cartel on U.S. commerce did, in fact, give rise to their claims. *Id.* 3a. The court also concluded that respondents have standing to sue. *Id.* 33a-37a.

SUMMARY OF THE ARGUMENT

In enacting the FTAIA, Congress acted against the backdrop of long-settled precedents applying the Sherman Act. A line of this Court's decisions dating back to *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911), holds that the Sherman Act bars anti-competitive conspiracies with substantial effects on U.S. commerce, and furthermore extends to the activities here *and abroad* in furtherance of such conspiracies. Petitioners' cartel was illegal under this settled law.

The "effects test" rests on the recognition that the United States may be seriously harmed by anti-competitive activities abroad. And, as this Court concluded in *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 315 (1978), absent liability to foreign plaintiffs, the perpetrators of a global conspiracy will use their profits abroad to compensate for the risk of punishment in this country. Bulk vitamins, in particular, are traded freely between geographic regions; in a competitive market, purchasers will buy wherever prices are lowest. There is therefore no "U.S. market" for bulk vitamins, but instead a global market.

In light of the foregoing, jurisdiction exists in this case for three independent reasons. First, even if petitioners' interpretation of the FTAIA were correct, respondents would satisfy it. Petitioners argue that in the FTAIA Congress excluded conduct affecting U.S. commerce from the Sherman Act unless those U.S. effects "give rise to" the plaintiff's claim. But the effect of petitioners' cartel on U.S. commerce *did* "give rise to" respondents' injuries. Petitioners stopped overseas purchasers such as respondents from buying bulk vitamins here, or from intermediaries who purchased here. Furthermore, had competitive conditions existed in this country, the cartel would have collapsed everywhere as a result of arbitrage.

Second, the FTAIA does not restrict the antitrust laws' application to global cartels. That statute defines the scope of the Sherman Act – *i.e.*, the conduct that the Sherman Act prohibits –

rather than the standing of private parties to sue. And it limits the Sherman Act *only* with respect to foreign commerce "other than import trade or import commerce" (15 U.S.C. 6a); likewise, its proviso limiting standing applies solely to conduct that only affects U.S. export commerce (*id.*, proviso)). The FTAIA therefore applies only to *export* commerce (see *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 798 (1993)) and not to cartels, which directly involve U.S. domestic and import commerce.

Third, even if the FTAIA did apply here, it would not impose the requirement petitioners propose. Clause 2, which is not a standing provision, does not require that the plaintiff's own injury arise from the effect of the defendants' conduct on U.S. commerce. Instead – as the United States, every antitrust treatise, and every other contemporaneous commentator recognized, and as the legislative history makes clear – Congress adopted Clause 2 merely to provide that the Sherman Act does not apply to conduct that has a *pro*-competitive effect in this country.

Petitioners' contrary reading rests on parts of three sentences in one House Report. H.R. REP. NO. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487 (House Report) (reproduced in App., *infra*). Legislative history that thin would not justify holding that Congress abandoned a century of precedent even if that Report addressed Clause 2 as finally enacted, but it did not. Even more important, in context, those quotations actually show that Congress intended to *reaffirm* the right of persons injured overseas to sue in U.S. courts.

Petitioners' "antitrust injury" and "antitrust standing" arguments, which mirror their jurisdictional arguments, are equally meritless. Those prudential doctrines seek to identify the most efficient enforcers of the antitrust laws; they do not create gaps immunizing unlawful activity from suit. Respondents are the prototypical enforcers of the antitrust laws; they are direct purchasers injured by the anti-competitive effects of petitioners' unlawful conduct, and their claims deter cartel activities that directly harm U.S. interests. Nor are cases like this one unmanageable; they are litigated together with the indistinguishable claims of domestic purchasers and require no special inquiries into foreign economic conditions because they allege *per se*

antitrust violations. Congress moreover declined in the FTAIA and afterwards to overrule decisions holding that a plaintiff's injury need *not* arise from the effects of anti-competitive activity on the United States.

Nor is there merit to the two remaining arguments advanced by petitioners' *amici*. First, the government's antitrust leniency program has no bearing on the questions presented, not least because it was adopted in all relevant respects well after Congress enacted the FTAIA. Pending legislation will limit the civil liability of leniency program participants, whereas the government's argument illogically would limit the exposure of companies that do *not* participate. And the government has in the past rightly disparaged precisely the argument it makes now. Worst, the government ignores that Clause 2 defines the *scope* of the Sherman Act, rather than the *standing* of private parties to sue, so petitioners' rule would equally limit the Sherman Act's application in criminal cases.

Second, "comity" and related doctrines are not presented here. In any event, petitioners have merely demonstrated the existence of *overlapping* jurisdictional regimes. Such overlaps are common, however, and do not preclude the exercise of U.S. jurisdiction. Of note, in contrast to *Hartford Fire*, there is not even an arguable conflict here between enforcement of the Sherman Act and any foreign regulatory regime, for cartels are universally condemned. But aggressive application of the Sherman Act remains necessary because current *enforcement* overseas is too lax to protect U.S. interests. Those nations that have anti-cartel laws but do not enforce them do not present comity concerns at all, since there is no substantive conflict of law and no risk of overlapping enforcement. Finally, it is Congress's job to account for changes in the international enforcement environment.

ARGUMENT

This case principally presents the question whether the "jurisdictional bar" of the FTAIA (Pet. Br. 42) limits the scope of the Sherman Act to instances in which the plaintiff's own claim arises from an anti-competitive conspiracy's effect on U.S. com-

commerce. It does *not* present the separate question whether, if the Sherman Act applies to respondents' claims and respondents have standing to sue, the U.S. courts should opt not to *exercise* jurisdiction to decide the claim. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. d (1987) ("[A]state may *exercise* jurisdiction based on effects in the state, when the effect or intended effect is substantial and the *exercise* of jurisdiction is reasonable under § 403.") (emphases added). No argument was made below that the court should pretermit this litigation based on comity, conflict of laws, or *forum non conveniens*. Thus, just as in *Hartford Fire*, this Court "need not decide" whether a court "should ever decline to exercise such jurisdiction on grounds of international comity." 509 U.S. at 798. Such concerns "come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction." *Id.* at 797 n.24 (citing *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (CA3 1979), which found jurisdiction, then remanded for consideration whether to exercise jurisdiction). See also Pet. C.A. Br. 41 n.16 (explaining that question presented by this case "*is different* from the question[] of 'comity'" (emphasis added)).[3]

Petitioners rightly note that the U.S. antitrust laws are intended to protect U.S. interests (Br. 8), but they seek a radical shift in the test for determining whether those interests are sufficiently implicated to trigger the Sherman Act's proscriptions. Petitioners focus on the antitrust laws' application to "transactions," a term that appears fifty-seven times in petitioners' brief, and zero times in the Sherman Act, the Clayton Act, and the FTAIA. In fact, it is settled that "the essence of any violation of Section 1 is the illegal agreement itself – rather than the overt

[3] In *Hartford Fire*, this Court rejected an attempt to incorporate concerns for the "reasonableness" of exercising jurisdiction into the definition of the scope of the Sherman Act. The Court held that Congress determined the "reasonable" scope of the antitrust laws when it codified the rule that the Sherman Act extends to overseas conduct with a substantial U.S. effect. 509 U.S. at 796-97 & nn.22-24.

acts performed in furtherance of it." *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330-31 (1991).[4]

Furthermore, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796.[5] This "effects" doctrine, first articulated by Judge Learned Hand in *United States* v. *Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 444 (CA2 1945), was "pioneered" for just this type of case: "Offshore cartels (*paradigmatically*) could be regulated by the U.S. antitrust laws if the cartel members intended to restrain commerce into the United States and their cartel had effects in the United States." Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 916 (2003) (emphasis added). Indeed, "one of the [Sherman Act's] express goals * * * was to combat the trusts and cartels which, as Senator Sherman put it, were 'imported from abroad.'" *Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong. 42 (1981) (Prof. James A. Rahl) (Hearings on H.R. 2326).

Purporting to describe "every case where this Court has applied U.S. antitrust laws to foreign activity" (Br. 11), petitioners actually omit the three principal precedents addressing worldwide cartel activity. *United States* v. *American Tobacco Co.* confronted the "division of the world's business" in tobacco through "contracts (executed in England)." 221 U.S. at 182, 172. This Court held that the Sherman Act prohibited "the assailed combination in all its aspects * * * including the foreign corporations in so far as by the contracts made by them they became coöperators in the combination." *Id.* at 184. *United States*

[4] Sherman Act jurisdiction mirrors the principle that if a conspiracy has a sufficient nexus to this country, U.S. law applies even if *all* overt acts in furtherance thereof were committed overseas. See, *e.g.*, *United States* v. *Wright-Barker*, 784 F.2d 161, 168 (CA3 1986) (citing cases).

[5] See also RESTATEMENT § 402(1)(c) ("a state has jurisdiction to prescribe law with respect to * * * conduct outside its territory that has or is intended to have substantial effects within its territory").

v. *National Lead Co.*, 332 U.S. 319, 348 (1947), held unlawful foreign agreements underlying the international titanium cartel. *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), affirmed an injunction against a conspiracy "to restrain interstate and foreign commerce by eliminating competition in the manufacture and sale of antifriction bearings in the markets of the world," including through "agreements providing for a territorial division of the world markets." *Id.* at 595. And indeed, "not a single one of the 248 foreign commerce antitrust actions brought by the Justice Department through May 1973 was dismissed for lack of subject matter jurisdiction." Barry E. Hawk, *Special Defenses and Issues*, 50 ANTITRUST L.J. 559, 560 (1981).[6]

The Sherman Act unquestionably renders petitioners' cartel unlawful under the effects test reaffirmed in *Hartford Fire*. With respect to all but one of the more than one dozen vitamins controlled by the cartel, the U.S. is the world's largest market, averaging 28% of all worldwide sales. Petitioners' cartel "affect[ed] billions of dollars of U.S. commerce and last[ed] for almost a decade." Belinda A. Barnett, Sr. Counsel to the Ass't

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[6] When this Court held that the Sherman Act does not apply, it was because the defendants' overseas conduct was *not* integrally related to anti-competitive effects in this country. A plaintiff may not merely assert the existence of a "global" conspiracy or "global" market but must, as here, be prepared to prove that the effects of the defendants' activities here and abroad are intertwined. In *Matsushita Electrical Industries* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), U.S. electronics manufacturers alleged that Japanese companies conspired to raise prices in Japan, using the profits to subsidize predatory pricing in the U.S. This Court reaffirmed that the Sherman Act "reach[es] conduct outside our borders * * * when the conduct has an effect on American commerce." *Id.* at 582-83 n.6. The Court held that the plaintiffs were accordingly required to prove that the "alleged cartelization of the Japanese market" caused "artificially depressed [prices] in the United States." *Ibid.* But the plaintiffs lacked such proof, and thus could not "recover antitrust damages based *solely* on an alleged cartelization *of the Japanese market*, because American antitrust laws do not regulate the competitive conditions of other nations' economies." *Id.* at 582 (emphases added). Petitioners quote only the *end* of this statement without acknowledging its context. Br. 11.

A.G., Antitrust Div., Speech of Nov. 30, 2000, at 2-3. As petitioners conceded below, "there is no real dispute that the vitamin companies' conduct had 'a direct, substantial, and reasonably foreseeable effect' on U.S. commerce." Pet. App. 9a.

So petitioners have no choice but to seek a dramatic change in the law. They ask this Court to restrict the Sherman Act to particular claims that arise from an effect on U.S. commerce. With respect to cartels in particular, petitioners' rule would effectively limit the Sherman Act to transactions that occur *in* U.S. commerce. See Br. 33 ("the location of individual 'transactions' [is] the controlling consideration for jurisdiction"). The Sherman Act's application to an anti-competitive worldwide cartel would for the first time be broken down transaction by transaction. In this brief, we demonstrate beyond peradventure that Congress did not intend to adopt this departure from the settled effects test.

I. Because Global Cartels' Domestic And Foreign Effects Are Inextricably Intertwined, Respondents Prevail Even Under Petitioners' Construction of The FTAIA And Foreign Plaintiffs' Claims Against Such Cartels Furthermore Directly Advance U.S. Interests.

As we demonstrate in the remainder of this brief, petitioners' arguments as to the scope of the Sherman Act are wrong. But even if petitioners were right on the law, their arguments would rest on two propositions that are simply wrong as a matter of basic economics: (i) that the effects of their cartel on U.S. commerce were irrelevant to respondents' injuries; and (ii) as such, the U.S. has no interest in deterring petitioners' conduct. The root of the error of both propositions is petitioners' failure to acknowledge that they were cartelizing a global market, not several geographically distinct markets. This premise – critical to their depiction of respondents' injuries as taking place in a "foreign market" and thus unrelated to the cartel's impact on the U.S. – is false, and without it, petitioners' arguments collapse.

This Part corrects petitioners' error, demonstrating that (A) the market for bulk vitamins is global; (B) the effects of the cartel on U.S. commerce gave rise to the claims of overseas pur-

chasers such as respondents; and (C) U.S. interests are advanced by recognizing the claims of all the cartel's victims.

A. The Market for Bulk Vitamins Is a Global Market.

Petitioners' brief rests entirely on the assumption that the bulk vitamins market is geographically divided, such that there is a distinct "U.S. market." See, *e.g.*, Br. 8, 40-41. This "U.S. market" is a fiction. Rather, there is a single, global market for bulk vitamins, which are fungible commodities bought and sold wherever the best price is available. Because transportation costs are minimal, purchasers can secure, and producers will deliver, supplies from whatever region of the world offers the best price.[7]

Respondents' complaint alleges that petitioners, who comprise essentially the entire worldwide production capacity for bulk vitamins, cartelized this "global market." J.A. 55.[8] Tracking the government's indictment of petitioners – under which they were prosecuted for the operation of their "worldwide" cartel "in the United States and elsewhere" (see *supra* at 1) – the complaint explains that the petitioners agreed to "fix, increase, and maintain the price and allocate the volume" for vitamins in "the United States and elsewhere." J.A. 35. As cartel participants admitted in documents disclosed in a vitamins trial, petitioners rigorously implemented "a proposal for the global and regional allocation of sales volumes among the companies."

[7] We are advised that Professor John M. Connor and others are submitting an *amicus curiae* brief detailing the features of the global vitamins market.

[8] The complaint's allegations not only must be taken as true at the motion to dismiss stage, but they comport with this Court's precedents on market definition. "[T]he relevant competitive market * * * is of course the area in which respondents and the other * * * producers effectively compete." *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 331-32 (1961). As Judge Posner explains, the relevant "market" is defined not by geographic boundaries, but by "the output of the suppliers to which a group of customers can turn for their requirements of a particular product." *United States* v. *Rockford Mem. Corp.*, 898 F.2d 1278, 1283 (CA7 1990) (citing *Tampa Electric*).

Animal Sci. Prods. v. *Chinook Group*, Misc. No. 99-197, MDL 1285 (TFH), Pl. Exh. G-12, at 1.[9]

B. The Effects Of Petitioners' Conduct On U.S. Commerce Gave Rise To Respondents' Claims.

Assuming *arguendo* that, as petitioners contend, Clause 2 of the FTAIA applies to this case *and* requires that the effect of the defendant's conduct give rise to the plaintiff's claim, respondents' claims meet that test. In a global market, the location of particular purchases is economically irrelevant: respondents' complaint is not merely directed at the sellers from whom they bought, nor at those sales transactions, but at the overall conspiracy that deprived them of the opportunity to purchase at competitive prices from *anyone*. As the D.C. Circuit recognized, respondents "claim that [they] were injured as a direct result of the increases in United States prices even though they bought vitamins abroad." Pet. App. 3a. Petitioners' maintenance of the cartel in the U.S. precluded overseas purchasers from purchasing vitamins in the U.S., or in their own countries from intermediaries who purchased here for resale abroad.

Indeed, petitioners entered into a worldwide conspiracy *precisely* to prevent their customers in one region from turning elsewhere to escape the cartel's super-competitive prices. See 1 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 5.13, at 213 (2003) (describing the "interdependence of the foreign and U.S. injured parties in * * * *Empagran*" because "the success of the global restraint" depended on cartelizing all national markets). As respondents argued in the district court, "prices in the United States were integrally interconnected with the prices outside of the United States. Pricing inside reflected pricing outside. * * * There was

[9] For example, petitioners' market division scheme included an agreement that a principal vitamins supplier would "exit[] North America by July 1993 or sooner." *Id.*, Pl. Exh. 120. See also *id.*, Pl. Exhs. 80, 84, 108, 140, 153 (charts and maps of allocated sales). Petitioners also purchased a U.S. producer's overproduction "to keep [that producer] from disrupting * * * markets outside of the United States" (*id.* Pl. Exh. G-12, at 37); and endeavored to buy out manufacturers that did not participate in the cartel (see, *e.g.*, *id.*, Pl. Exh. G-12, at 7).

a unitary world market where virtually all purchasers * * * were considered fungible, and an injury in one market caused an injury in every other segment of that market." C.A. J.A. 72.

Indisputably, had respondents attempted to purchase vitamins from cartel members in the U.S. at competitive prices, this suit would be proper. But overseas purchasers cannot be expected to take such a futile step; petitioners' cartel commitments were the equivalent of placing out a sign in the United States declaring, "Sales to foreign purchasers prohibited."

Petitioners' conspiracy in the U.S. caused respondents' injury in another sense: if the conspiracy had not extended to the U.S., it would have collapsed worldwide. It is well established that if not prevented, arbitrage will destroy a price-fixing cartel or at least severely limit its profits. As a consequence of "the resale by the low-price purchasers to the purchasers to whom the seller charges a high price" abroad, petitioners "would have no sales at [the higher price]." RICHARD A. POSNER, ANTITRUST LAW 83 (2d ed. 2001). Given the central role of the U.S. economy in world trade, "including the United States in a price-fixing conspiracy is necessary to generate monopoly profits." *Den Norske Stats Oljeselskap AS* v. *Heeremac v.o.f.*, 241 F.3d 420, 435 (CA5 2001) (Higginbotham, J., dissenting).

Thus, even on petitioners' construction of the FTAIA, requiring that the U.S. effects "give rise to" the *plaintiff's* claim, the statute does not bar respondents' claims. The phrase "gives rise to" in Clause 2 requires causation, but not that the plaintiff be injured *in* U.S. commerce. See U.S. Br. 14 n.3 (conceding this point); cf. *United States Indus./Fed. Sheet Metal* v. *Director*, 455 U.S. 608, 615 (1982) (language "arising out of" simply imposes a causation requirement). Here, the anti-competitive effects of petitioners' worldwide cartel on the United States are a "but for" cause of respondents' injuries; absent those effects, petitioners could have escaped cartel-dictated prices by purchasing from U.S. suppliers or from intermediaries who did. Nor is this causation "indirect and remote." Contra Pet. Br. 41. To the contrary, respondents' injuries are a completely foreseeable effect of petitioners' conduct with respect to the United States – indeed, respondents' inability to make lower-priced purchases in

the United States was the *intended* consequence of that conduct, not some unpredictable incident of it. Thus, even on the reading *most* favorable to petitioners – requiring that the U.S. effects be both a factual and a proximate cause of the plaintiff's own injury – respondents would still prevail.[10]

C. U.S. Interests Are Directly Advanced By Recognizing The Claims Of All Victims Of An Integrated Cartel That Operates In The United States.

As Judge Higginbotham has explained, given the integrated nature of global markets, claims of foreign cartel victims "serve a single function: the protection of United States commerce." *Den Norske*, 241 F.3d at 438-39 (dissenting opinion). Indeed, foreign purchasers are, in cartel cases like this one, essentially the *only* enforcers of the antitrust laws with respect to the cartel's unlawful activities abroad. If a U.S. vitamin manufacturer had sought to compete abroad against the cartel's members, it could unquestionably have sued petitioners under the Sherman Act (see, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 124-25 (1969); *Cont'l Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 700, 704 (1962)), but because petitioners cartelized all bulk vitamins suppliers, all of the U.S. companies that could have been *competitors* are in fact *co-conspirators*. And suits by U.S. purchasers alone cannot deter cartels because they cannot force them to dis-

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[10] Proximate cause is probably not required, however. In various other contexts, courts have refused to infer such a test from similar language requiring that a plaintiff's claim "arise" from a particular cause. See, *e.g.*, *SFH, Inc.* v. *Millard Refrigerated Servs.*, 339 F.3d 738, 743 (CA8 2003) (only "but for" cause required); *Hamilton* v. *United Healthcare of La.*, 310 F.3d 385, 391 (CA5 2002) ("arising out of" means "incident to, or having connection with"); *Williams* v. *Imhoff*, 203 F.3d 758, 765-66 (CA10 2000) ("arising out of" means "'originating from,' 'growing out of,' or 'flowing from,'" and does not require proximate cause); *Ballard* v. *Savage*, 65 F.3d 1485, 1500 (CA9 1995) (applying "but for" test to determine if plaintiff's claim arises from contacts with the forum for personal jurisdiction purposes); *Lanier* v. *Am. Bd. of Endodontics*, 843 F.2d 901, 909 (CA6 1988) ("arising from" means "made possible" by or "lies 'in the wake' of" (quoting CA7 cases)).

gorge their overseas profits. Petitioners' position would thus "change[] the calculus of risk for rational cartel participants in a way that significantly decreases the law's deterrent effect on international cartels." Ronald R. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, ANTITRUST, Summer 2001, at 53.

Specifically, the deterrent value of foreign purchasers' claims furthers U.S. interests in three respects. First, just as foreign consumers benefit when civil liability deters the closure of the U.S. market, U.S. consumers benefit directly when the overseas activities of an integrated, worldwide cartel are deterred. See *supra* at 11. Had petitioners fixed prices only in this country, U.S. purchasers could have obtained vitamins at competitive prices, either directly from abroad or from arbitrageurs. And had petitioners' market allocation scheme not kept certain suppliers out of the U.S. market, U.S. consumers would have benefited from lower-cost foreign supplies. Thus, petitioners engage in "semantic * * * gamesmanship" in characterizing their cartel as involving "a 'foreign conspiracy' * * * separate from 'a U.S. conspiracy'"; "but for the alleged foreign anticompetitive activity, it would have been impossible, given the globalized nature of the relevant markets, to impose an anticompetitive overcharge in the United States." Davis, *supra*, at 53, 54.

Second, deterring cartel activity abroad prevents cartels from emerging and accelerates their collapse, both to the benefit of U.S. consumers. Had petitioners' agreement not extended worldwide, its profits would have been severely limited by arbitrage. The availability of vitamins for export at competitive prices from overseas would have precluded super-competitive pricing anywhere else in the world, including the U.S. Indeed, when several Chinese suppliers, who were not cartel participants, began selling certain bulk vitamins in the global market in the mid-1990s, the cartel-set prices collapsed broadly. JOHN M. CONNOR, GLOBAL PRICE FIXING 293, 325 (2001).

Third, imposing liability for *all* of a worldwide cartel's activities prevents the participants from using their illegal overseas profits to subsidize the risk of liability in this country. In *Pfizer*,

this Court refused to bar foreign plaintiffs' claims and thereby "lessen the deterrent effect of treble damages":

> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely export abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.

434 U.S. at 315. This Court rejected the defendants' argument (echoed by petitioners) that the antitrust laws protect Americans, a contention that "confuses the *ultimate purposes* of the antitrust laws with the question of *who can invoke* their remedies." *Ibid* (emphases added). See also *infra* at 32 (discussing FTAIA legislative history embracing *Pfizer*'s rationale).[11]

The added deterrent value provided by foreign purchasers' claims is vital in the context of a global cartel. Petitioners have recently paid approximately $5 billion in criminal and civil sanctions, a sum that not only is significantly lower than the approximately *$10 billion* in profits that the cartel realized during the 1990s, but is dwarfed by the present value of those profits.

Even that comparison overstates the deterrent value of the liability imposed on petitioners, *who were caught*. Adequate deterrence requires monetary liability that not only removes all illegal profits, but also reflects the probability that the wrongdoers might not have been caught. RICHARD A. POSNER, ECO-

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[11] Petitioners' assertion that the plaintiffs in *Pfizer* purchased goods in the U.S. export market, not overseas (Br. 37), not only is "not clear" as a factual matter (SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 9:9, at 9-25 (3d ed. 1997)), but also is a distinction without a difference. The location of the transaction often reflects happenstance; it says nothing about where its anti-competitive effects will be felt. Not surprisingly, this Court's opinion in *Pfizer* "betrayed no interest in minutiae, such as the geographic situs of transfer of title." Davis, *supra*, at 53, 54.

NOMIC ANALYSIS OF THE LAW 77-78 (1st ed. 1972). The available data on purely domestic cases "estimate[s] the probability of successful government prosecution of a price-fixing conspiracy in the United States to be, at most, between 13 and 17 percent." Wouter P.J. Wils, *Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, In Particular Imprisonment?* 13 (2001). International cartels are even more difficult to uncover, given their extraordinary sophistication, the fact that their activities often occur abroad, and the availability of national boundaries as a "cover" for the absence of international competition. See James M. Griffin, Dep. Ass't A.G., Speech of Apr. 6, 2000.

Moreover, because a cartel cannot be sustained elsewhere if the U.S. market is competitive, effective deterrence requires that a cartel face punishment in the U.S. sufficient to offset its profits everywhere. See Harry First, *Evolving Toward What? The Development of International Antitrust*, *in* THE FUTURE OF TRANSNATIONAL ANTITRUST LAW 47 n.91 (Josef Drexl ed., 2003).[12]

3. Given the foregoing, petitioners' argument that the United States has no interest in compensating foreign purchasers (Br. 35-36) is sleight of hand, for "the goal of sanctioning cartel conduct is *general deterrence*, *i.e.*, to deter others from engaging in the offending conduct." James M. Griffin, Dep. Ass't A.G., Speech of May 2002, at 6 (emphasis added). Congress adopted the Clayton Act's civil damage remedy, in particular, to "enlist private plaintiffs in the work of detecting, punishing, and thereby deterring wrongdoing." Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1127 (1976). That remedy enhances deterrence in two ways: by increasing the probability of detection by creating an incentive for private litigants to uncover cartels; and by increasing the penalty upon detection.

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[12] For the reasons detailed in the text, the view that the antitrust laws should not be read "to apply United States law to a transaction whose relation to the United States" is "minimal" (1A AREEDA ET AL., *supra*, ¶ 273c4 n.25 (2003 Supp.)) does not undercut the specific basis for finding jurisdiction over worldwide cartels.

There is "no dispute that cartel activity will not be deterred if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards." Scott D. Hammond, Dir. of Crim. Enf., D.O.J. Antitrust Div., Speech of Sept. 12, 2000, at 4. Petitioners' hard core price-fixing in an unregulated market – "the supreme evil of antitrust" (*Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 879 (2004)) – calls for the most severe sanction. Congress did not intend the protection of U.S. interests to "depend on the uncertainties of foreign antitrust enforcement." Pet. App. 33a. Further, even accounting for other nations' anti-cartel enforcement mechanisms, it is clear that, as the OECD has recently concluded, "larger sanctions are required to achieve effective deterrence." OECD, HARD CORE CARTELS 3 (2002). Economic studies have calculated the "optimal fine" for deterrence purposes as at least "187% of the *commerce affected* by the cartel," not merely the monopoly profits, such that "actual fines imposed were found to be less than 1% of the level necessary to deter cartel conduct. While fines have increased significantly [since then,] they are not now and never will be *anywhere near* the optimal fine level established by those studies." James Griffin, Dep. Ass't A.G., Speech of May 2002, 6-7 (emphasis added).[13]

The need for greater sanctions in part reflects the fact that foreign anti-cartel provisions are rarely enforced. Although "more than 90 countries now have antitrust laws, and almost all of these laws have anti-cartel provisions," "[h]aving laws is not enough; they must be enforced." William J. Kolasky, Dep. Ass't A.G., Speech of Jan. 25, 2002. As the government's principal modern study on international antitrust enforcement recently concluded, "[O]verall anticartel enforcement levels around the world *remain fairly low outside the United States*." Int'l Comp. Pol'y Adv. Comm., Final Rep't to the A.G. 186 (2000) (DOJ ICPAC Final Report) (emphasis added).[14]

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[13] We are advised that Joseph Stiglitz, Nobel Laureate and former World Bank Chief Economist, is submitting an *amicus curiae* brief demonstrating that worldwide cartels are seriously under-deterred.

[14] A principal gap in cartel enforcement results from the refusal of national governments to enforce competition laws against resident

This case illustrates the point dramatically. Petitioners report that they have been subject to governmental actions by four competition authorities ("the European Union, Canada, Australia, and Korea") and private actions in seven nations ("Canada, the United Kingdom, Germany, Belgium, and the Netherlands," as well as "Australia and New Zealand"). Br. 4. Yet the cartel inflicted injuries in countries the world over.

Furthermore, the deterrent effect of foreign civil liability is minimal; civil suits against cartels in other countries have been largely unsuccessful. For example, although petitioners tout European enforcement, the Deputy Head of the EC Directorate General for Competition very recently confirmed that there has long been "limited private enforcement of EC competition rules." Donncadh Woods, Paper of Feb. 20, 2004, at 3, 5.[15] And even when private damages are awarded, "[t]he published cases

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corporations. "Cartels continue to be a way of life in many parts of the world, impeding economic performance, promoting inequality, impoverishing consumers, and thereby providing fuel for those who oppose globalization and free market ideals." William J. Kolasky, Dep. Ass't A.G., Speech of Jan. 25, 2002, at 2. Cartels, "which seem to be quite frequent and to affect a number of countries," "create a competition problem in foreign countries" whose "competition laws and policies in the countries in which they take place are usually *powerless* to curb them. Indeed, the jurisdiction of domestic competition authorities is usually limited to practices which affect competition in their own country." Frédéric Jenny, Chairman, OECD Competition Law and Pol'y Comm., *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, *in* COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM 295, 306 (Clifford A. Jones & Mitsuo Matsushita eds., 2002).

[15] For example, in England "there has been *one* successful action * * *, against the snooker world governing body"; "[i]n Italy there does not appear to have been *any* successful damages actions"; and "in Germany the only [successful] action [was] a declaratory action and no damages were awarded." Donncadh Woods, Paper of Feb. 20, 2004, at 17 (emphases added). A German court recently "held that purchasers of cement at cartel prices could not claim damages *unless they had been individually targeted* by a market-sharing cartel." *Id.* at 10 (citing *Max Boegl Bauunternehmung* v. *Hanson Germany*, Judgment of the Berlin Landgericht of 27 June 2003 (emphasis added)).

that have reached a decision in Europe suggest that damages awarded by national courts are modest in value." *Id.* at 6.[16]

II. The FTAIA's Jurisdictional Limitation Does Not Apply To Conduct Involving Import Commerce And Thus Does Not Apply To Worldwide Cartels.

Even if this Court did not accept our argument that respondents' claims arose from the U.S. effects of petitioners' conduct, respondents would still prevail because the premise of petitioners' brief – that the FTAIA applies to this case – is wrong. In fact, the FTAIA does not apply to worldwide cartels, which are not limited to U.S. export commerce. See Resp. C.A. Br. 17. Congress did not take the illogical step, contrary to U.S. interests, of narrowing the Sherman Act's application to cartels' overseas activities in public and private enforcement actions.

A. The FTAIA Limits The Scope Of The Sherman Act Solely In Cases Involving Only U.S. Export Commerce.

1. The FTAIA was enacted as Title IV of the Export Trading Company Act of 1982. Congress expressly declared: "[T]he purpose of this Act is to increase United States exports of products," including "by modifying the application of the antitrust laws to certain export trade" in the FTAIA. Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234 (1982). "Every single congressional finding relates to the importance of export business and the need to encourage export activity by American business." *Den Norske*, 241 F.3d at 433 (Higginbotham, J., dissenting).

Two features make clear that the FTAIA promotes U.S. exports without *otherwise* narrowing the Sherman Act's reach. First, the provision that includes Clauses 1 and 2, and thereby defines the scope of the Sherman Act, is limited by its introductory language to conduct involving foreign commerce "*other than* import trade or import commerce" (emphasis added). This provision was intended to replace the courts' varying "expression[s] of the proper test for determining" jurisdiction in export

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[16] Nor could the existence of foreign antitrust regimes have informed the Congress that enacted the FTAIA; in 1982, "few countries had antitrust laws and fewer still enforced them." Charles A. James, Ass't A.G., Speech of Oct. 17, 2001, at 2.

cases (App., *infra*, at 4a) and thereby "create more certainty in the application of antitrust laws for those people who are about to engage in export trade activities" (Sherman E. Unger, *The Role of the Commerce Department*, *in* THE EXPORT TRADING COMPANY ACT OF 1982 11, 12 (Joseph P. Griffin ed., 1982)).

As this Court has already recognized, this critical introductory language – which petitioners omit (see Br. 3, 15) – means that the FTAIA's requirements apply only to "conduct involving foreign trade or commerce, *other than import trade or import commerce*." *Hartford Fire*, 509 U.S. at 796 n.23 (emphasis added). "The FTAIA was intended to exempt from the Sherman Act *export* transactions that did not injure the United States economy." *Ibid.* The FTAIA's statutory limitation, in sum, "applies to *export* trade." 1A AREEDA ET AL., *supra*, ¶ 273c4 (emphasis in original). Accord RESTATEMENT § 415 cmt. a ("Congress has limited the application of the antitrust laws where they would affect United States export trade only.").[17]

Second, Congress effectuated its intent to further the interests of exporters in the FTAIA's proviso, which states:

> If sections 1 to 7 of this title [the Sherman Act] apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. 6a. Cases governed by "paragraph (1)(B)" – which we will call "export cases" – affect U.S. commerce only with respect to "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." *Id.* § 6a(1)(B).

[17] By contrast, if Congress had intended the FTAIA to provide a universal standard for international antitrust actions, it would have neither included the statute's introductory limitations nor limited its application only to *Sherman Act* claims. "It had been proposed that the standard of 'direct, substantial, and reasonably foreseeable effect' set out in the [FTAIA] should be applied to all types of commerce of the United States, including import and domestic commerce, and that the amendments apply also to the Clayton Act (dealing with mergers and acquisitions); the suggestions were not accepted by Congress." RESTATEMENT § 415, rptrs. notes (emphasis added).

The proviso limits standing in export cases by "preclud[ing] suits by foreign purchasers of U.S. exports." Pet. Br. 19. The effect of the proviso is that "[f]oreign plaintiffs complaining of injuries sustained as a result of such combination of exporters would, in effect, *lack standing* under the Sherman Act." RESTATEMENT § 415, rptrs. notes (emphasis added). The proviso's restriction on standing notably does *not* apply to non-export cases, like this one, which are instead governed by paragraph (1)(A) and thus involve conduct that has a sufficient effect on "trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations." 15 U.S.C. 6a(1)(A). Indeed, the legislative history makes that very point. "Under current law, foreign nationals located abroad may in certain circumstances recover under our antitrust laws. *H.R. 5235 does not change that.* But if the requisite effect is felt *only* with respect to our export commerce, then H.R. 5235 does limit who may recover to persons engaged in export trade or commerce 'in the United States.'" 128 Cong. Rec. 18,953 (1982) (Rep. McClory) (emphases added).

2. This case implicates neither the text of the FTAIA nor its purpose. And cartels, by restricting where participants may sell, *harm* exporters by foreclosing U.S. export opportunities.

In enacting the FTAIA to promote U.S. exports, Congress did not change the long-settled rule that the Sherman Act governs the domestic and foreign activities of cartels affecting the U.S.: "*[o]f course*, [the FTAIA] was *not* intended to cover the situation of a foreign cartel targeting United States markets." 1A AREEDA ET AL., *supra*, ¶ 272i n.69 (emphases added). "Importantly, the [FTAIA] is not intended to affect jurisdiction over foreign conduct affecting *imports* into the United States. The Sherman Act's application to United States and foreign participation in international *cartels* remains unchanged, as the House Report expressly recognizes." Barry E. Hawk, *International Antitrust Policy and the 1982 Acts*, 51 FORDHAM L. REV. 201, 220 (1982) (emphases added). "*It could not be clearer* that the FTAIA serves to exempt exporting from antitrust scrutiny, not to

limit the liability of participants in transnational conspiracies that affect United States commerce." *Den Norske*, 241 F.3d at 433 (Higginbotham, J., dissenting) (emphasis added).

The government's Antitrust Enforcement Guidelines for International Operations expressly state that cartels like petitioners' "Vitamins, Inc." are not subject to the FTAIA. The Guidelines declare that conduct implicating foreign commerce is subject to one of two jurisdictional tests: (i) *Hartford Fire*'s rule that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"; or (ii) the FTAIA standard. U.S. D.O.J., *Antitrust Enforcement Guidelines for International Operations* § 3.11 (1995). The Guidelines explain that, because the FTAIA applies only "to foreign commerce *other than imports*," it does *not* apply to cartels of "foreign companies that produce a product in various foreign countries" and "make substantial sales into the United States." *Ibid.* (emphasis added). So long as the cartel engages in U.S. *import transactions*, jurisdiction over the *entire cartel* "is clear under the general principles of antitrust law expressed most recently in *Hartford Fire*," because the facts "demonstrate actual and intended participation in U.S. commerce." *Ibid.* By contrast, the FTAIA *would* apply when there are *no* direct sales to the U.S., *i.e.*, "in cases in which a cartel of foreign enterprises * * * reaches the U.S. market through any mechanism that goes beyond direct sales, such as the use of an unrelated intermediary." *Id.* § 3.12.

The same conclusion follows from the version of the Guidelines in effect at the time Congress enacted the FTAIA. Congress intended the FTAIA's jurisdictional provision to function as "a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards." App., *infra*, 5a. At that time, the 1977 Guidelines provided that Sherman Act jurisdiction extends to cartels without regard to where particular activities in furtherance of the cartel occurred. U.S. D.O.J., *Antitrust Guide for International Operations*, Case L, "Dealing With A Cartel" (Jan. 26, 1977). As described by the then-Deputy Assistant Attorney General for Antitrust, the position of the United States accordingly was "*strongly* that the application of the antitrust laws to *foreign transactions* is *essential* to effective domestic enforcement." John H. Shenefield, *The Perspective of the U.S. Department of Justice*, *in* PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 12, 24 (Joseph P. Griffin ed., 1979) (emphases added).

B. The Authorities Cited By Petitioners Actually Support *Respondents'* Reading Of The FTAIA.

In contrast to this overwhelming evidence of the limited aegis of the FTAIA, petitioners muster four quotations from scholars ostensibly indicating that Congress intended to eliminate the claims of purchasers in overseas markets. But each of those quotations actually addresses the FTAIA's proviso on *export* commerce, *not* its provision defining the Sherman Act's scope.

First, petitioners quote the Areeda antitrust treatise as stating that "'a foreign consumer whose only injury is felt entirely in his foreign country cannot [sue].'" Br. 14 (brackets in Pet. Br.). In fact, the full quote states:

> The *final quoted sentence* [of the FTAIA] is designed to make clear that a foreign firm *operating an export business* in the United States continues to be protected by the antitrust laws with respect to that business but not with respect to its operations outside the United States. Thus, although the exporter can sue with respect to the injured *export business*, a foreign consumer whose only injury is felt entirely in his foreign country cannot.

1A AREEDA ET AL., *supra*, ¶ 272h (emphases added).

Petitioners next quote a law review article to the effect that "foreign consumers need not be protected by the U.S. antitrust laws." Br. 35-36. In fact, the full quote states:

> Similarly, Atwood's suggestion that foreign consumers need not be protected by the U.S. antitrust laws has been largely enacted into law, *in Title IV's provision that only those involved in U.S. export business may complain of restraints on U.S. exports.*

David Gill, *Review of Antitrust and American Business Abroad*, 77 AM. J. INT'L L. 679, 781 (1983) (emphasis added).

Petitioners next quote an international antitrust treatise as stating that "[a]ntitrust injury suffered in foreign markets is excluded." Br. 36. In fact, the full quote states:

> The purpose and thrust of the FTAIA have been discussed above. Antitrust injury suffered in foreign markets is excluded from the scope of the Sherman and Federal Trade Commission Acts *unless it involves injury to a U.S. exporter*. Therefore, a foreign company claiming injury in one or more foreign markets *resulting from restraints of trade on the part of U.S. exporters* has no U.S. antitrust cause of action.

MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 52 (2001) (emphases added). The "discuss[ion] above" to which the author refers explains that the FTAIA "provid[es] a definition of the jurisdictional reach of the Sherman and FTC Acts *in the realm of export trade*." *Id.* at 51 (emphasis added).

Petitioners finally quote another treatise as stating that the FTAIA "exclude[s] claims for [injuries] incurred only in foreign markets." Br. 36 (second alteration in Pet. Br.). In fact, this quotation appears in the treatise's chapter on "Export Commerce," and specifically addresses the FTAIA's "limitation of standing *to foreclosed U.S. exporters*." 1 HAWK, *supra*, at 182.2-.3 (Supp. 1996-1) (emphasis added). The full quote then states with respect to such export claims:

> [The FTAIA] affects only jurisdictional rules and standing in the limited sense to exclude claims for [injury] incurred only in foreign markets. Substantive rules concerning antitrust injury and antitrust standing generally were not intended to be affected by Title IV. The House Report states as an example that the mere fact that *an exporter* may be financially harmed by the challenged conduct does not necessarily mean that it has sustained antitrust injury. Thus there may be no antitrust injury where harm is only to an individual firm (*exporter*) and there is no harm to competition.

Ibid (emphases added). The treatise author manifestly does not agree with petitioners. See *id.* at 177-78 (concluding that "Sherman Act jurisdiction over international cartels that affect imports and harm domestic competition remains unchanged");

id. at 292 n.79 ("The 1982 amendments to the Sherman and FTC Acts were not intended to change their jurisdictional reach over international cartels.").

III. Congress Inserted Clause 2 Merely To Ensure That The Covered Foreign Conduct Must Have An *Anti-Competitive* Impact On Domestic Commerce To Be Actionable Under The Sherman Act.

Even if the FTAIA applies to this case, Clause 2 does not require that the U.S. effects give rise to the plaintiff's claim. Rather, it requires only that the challenged conduct's effect on U.S. commerce be *anti*-competitive.

At the time the FTAIA was enacted (several years before this Court's decision in *Matsushita*), there was "great confusion over whether the [defendants' conduct] must in some way *adversely* affect the commerce involved." James A. Rahl, *American Antitrust and Foreign Operations*, 8 CORNELL INT'L L.J. 1, 7 (1974). Congress resolved that confusion by adopting Clause 2 to codify the Second Circuit's holding in *National Bank of Canada* v. *Interbank Card Ass'n*, 666 F.2d 6 (1981), that only *anti-competitive* effects on U.S. commerce are actionable. Accord *Kruman*, 284 F.3d at 399-400; *Den Norske*, 241 F.3d at 432 n.36 (Higginbotham, J., dissenting). As one of the principal House sponsors, Representative McClory, explained:

> Another point which might be misunderstood regarding the standard of [the FTAIA] is the nature of the effect. Clearly, our exports create jobs and increase profits in the United States and thus have a beneficial impact on our economy. But this effect does not satisfy the standard of [the FTAIA]. * * * For what is needed is an effect in the United States, either in its domestic or its export commerce, which *gives rise to a claim under the antitrust laws*, as known today or as hereafter amended. Thus a beneficial effect or an adverse effect is, as such, insufficient. It must be an antitrust effect.

128 Cong. Rec. 18,953 (1982) (emphasis added).

Indeed, in the wake of the FTAIA's passage, the consensus view was that Congress adopted Clause 2 simply to codify the

National Bank of Canada rule. Petitioners' assertion that "[f]ollowing enactment of the FTAIA, scholars and enforcement officials understood the amendment to preclude recovery for foreign injury" (Br. 35) is simply wrong:

- The government has for decades taken the view that Clause 2 merely adopts the *National Bank of Canada* rule.[18]
- *Every* antitrust treatise agrees. *E.g.*, 1A AREEDA ET AL., *supra*, ¶ 272h2 n.49 (under Clause 2, "the effects must be 'of the type that the antitrust laws prohibit'").[19]
- *Every* contemporaneous law review commentator agreed.[20]

For the following reasons, this consensus view is correct.

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[18] See, *e.g.*, Donald Zarin, Office of Gen. Counsel, Dep't of Commerce, *The Export Trading Company Act: Reducing Antitrust Uncertainty in Export Trade*, 17 GEO. WASH. J. INT'L L. & ECON. 297, 313-14 (1983) ("In addition to requiring a direct, substantial, and reasonably foreseeable effect, title IV requires, as a jurisdictional element, that the effect *give rise to a claim* under the Sherman or FTC Acts. *This language* apparently is intended to ensure that an anticompetitive effect exist as a condition precedent to the assertion of jurisdiction." (emphases added)); Charles S. Stark, Chief, Foreign Commerce Section, U.S. D.O.J., Speech of Dec. 5, 1983, at 20-21 ("Title IV was intended not merely to clarify the quantum of domestic impact required to support antitrust jurisdiction, but the kind of impact. According to the Committee, 'the domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit.' The remainder of the discussion in the report, and its reference to the *National Bank of Canada* case, make it clear that the effect on U.S. commerce has to be an anticompetitive effect.").

[19] See also 1 WALLER, *supra*, § 9.7, at 9-12 to -13 (Supp. 2003); 1 HAWK, *supra*, at 179 (1996-1 Supp.); 1 WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.14, at 106 (5th ed. 1996).

[20] *E.g.*, John F. Bruce & John C. Pierce, *Understanding the Export Trading Company Act and Using (Or Avoiding) Its Antitrust Exemptions*, 38 BUS. LAW. 975, 986-87 (1983); Barry E. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 223 (1982); John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 365 & n.85 (1983); A. Paul Victor & John G. Chou, *United States Antitrust Jurisdiction Over Overseas Disputes After Title IV of the 1982 Export Trading Company Act and* Timberlane, 10 FORDHAM INT'L L.J. 1, 14 (1986).

A. The Drafting History, Text, And Structure Of The FTAIA Confirm Congress's Intent To Adopt The *National Bank of Canada* Rule.

1. Clause 2's drafting history illuminates the statutory language. The "problem" addressed by Clauses 1 and 2 was the "possible ambiguity in the precise legal standard" under prior case law – specifically, "the *quantum* and *nature* of the effects required to create jurisdiction." App., *infra*, 9a (emphases added). As originally proposed, the FTAIA addressed only "quantum," requiring a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Foreign Trade Antitrust Improvements Act, H.R. 5235, 97th Cong. § 7(1) (1982). Contrary to petitioners' assertion that such an effect "would, virtually by definition, give rise to 'a claim' by *someone*" (Br. 20), the A.B.A. explained that the original bill "ignore[d] whether conduct has an adverse effect on competition," such that "conduct which has an anticompetitive effect which impinges only on defendants located in foreign nations and which also has a neutral or procompetititve domestic effect would be subject to the antitrust laws." Hearings on H.R. 2326, *supra*, at 259.

In response to the A.B.A.'s point, Congress added Clause 2. App., *infra*, 19a. Quoting the A.B.A.'s comments and citing *National Bank of Canada*, the House Report explains that

> the domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.

Ibid (emphasis in original). The Report subsequently reiterates that, under the bill as revised, "the proscriptions of the Sherman Act do not apply to *export or purely foreign commerce* unless the conduct has a direct, substantial and reasonably foreseeable *anticompetitive* effect on domestic or import commerce, or a domestic export opportunity." *Id.* 23a (emphases added).

In response to the A.B.A.'s comments, Clause 2 was initially revised to require that the effect on U.S. commerce be "the basis of the violation alleged under this Act." H.R. 5235, 97th Cong. § 7(2) (1982), *reprinted at* App., *infra*, 3a. Precisely because that language might be misread in the way petitioners now propose, it was further revised. As explained by Congressman Rodino (the author of the bill and revision), the Committee "added th[e] language" of Clause 2 simply "to make it absolutely clear that the basis of American antitrust jurisdiction has to be a domestic *anticompetitive* effect." *Id.* 29a (emphasis in original). The final language enacted into law – that the effect on U.S. commerce must "give rise to a claim" – was adopted to *reject* any "suggest[ion] that an effect, rather than conduct, is the basis for a violation." *Ibid.* Petitioners, of course, press *precisely* the construction that the statute was revised to reject: "that the effect" on U.S. commerce, "rather than conduct" (*i.e.*, petitioners' conspiracy), "is the basis for a violation" of the Sherman Act.

Moreover, Congress rejected proposals offered by business groups that indeed would have prohibited suits by persons not injured as a result of the effect on U.S. commerce.[21] These proposals sought to provide "antitrust liability only to those persons injured within the United States." Hearings on H.R. 2326, *supra*, at 109 (statement of Martin F. Connor, General Electric Co.). Congress did not indicate any solicitude for that view,

[21] See *The Foreign Trade Antitrust Improvements Act: Hearings on S. 795 Before the Comm. on the Judiciary*, 97th Cong. 130 (1981) (Business Roundtable) (proposing: "If conduct involving trade or commerce with foreign nations does directly, substantially, and foreseeably restrain trade or commerce within the United States, then the parties engaging in such conduct shall be liable *only for any injury so occurring within the United States* by reason of such restraints." (emphasis added)); Hearings on H.R. 2326, *supra*, at 39-40 (General Motors Corp.) (proposing: "This Act shall not apply to conduct involving trade or commerce with any foreign nation unless, and *only to the extent that*, such conduct has a direct, substantial and foreseeable effect on trade or commerce within the United States or has the direct, substantial and foreseeable effect of excluding a domestic person from trade or commerce with such foreign nation." (emphasis added)).

other than in the proviso, which *did* narrow foreign purchasers' standing in *export* cases.

2. The FTAIA's *structure* refutes petitioners' transaction-by-transaction approach to Sherman Act jurisdiction as well. Clause 1 limits the Sherman Act's application by reference to "conduct." The courts of appeals are unanimous that the term "conduct" "refers to any conduct that would violate sections 1 to 7 of the Sherman Act absent the FTAIA." *Kruman*, 284 F.3d at 398. Accord Pet. App. 9a. In a Section 1 case, the defendants' "conduct" is – as the government concedes – "their conspiracy to fix prices and allocate markets" (U.S. Br. 14), not isolated sales transactions. "The illegal act in this case was not the *imposition* of high prices but the *formation of the agreement to fix prices*." *Kruman*, 284 F.3d at 398 (emphasis added).

Clauses 1 and 2 work in conjunction; the latter defines the nature of the U.S. effect required by the former. Clause 2 contains no suggestion that Congress intended it nonetheless to have a very different focus: not on the defendant's conspiracy but instead on particular sales transactions. Given this structure, Clause 2 is most naturally read as addressing the same issue as Clause 1 – *viz.*, determining whether the Sherman Act proscribes the defendant's *conspiracy*. It is not naturally read to shift the jurisdictional inquiry from the defendant's conduct to whether the particular claim before the Court arises in U.S. commerce.

3. For three reasons, Clause 2's text confirms that Congress intended simply to adopt the *National Bank of Canada* rule.

First, Clause 2 refers to "a claim," which naturally means "any claim," and which contrasts with the requirement of the prior version of Clause 2 that Congress rejected, that the effect on U.S. commerce be "the basis for *the* violation." Petitioners' reading furthermore avowedly requires inserting the word "plaintiff" into the statute: "The indefinite article 'a' refers generically to 'a claim' *of the plaintiff—i.e.*, any claim that *the plaintiff* may have 'under the provisions of sections 1 to 7' of the Sherman Act." Pet. Br. 15 (emphasis added and omitted). Surely, if Congress had intended to adopt petitioners' reading, which significantly changes the longstanding approach to Sherman Act coverage, it would have used the phrase "give[]

rise to *the plaintiff's* claim." *Kruman*, 284 F.3d at 400. Accord *Den Norske*, 241 F.3d at 432 (Higginbotham, J., dissenting).

Second, the introduction to the FTAIA provides that the Sherman Act "appl[ies]" to a conspiracy "unless," rather than "to the extent that," the conditions set forth in Clauses 1 and 2 are met. Petitioners acknowledge that their position "would subject the same 'unitary' conduct [*i.e.*, their conspiracy] to U.S. antitrust regulation in some cases and not in others, depending on whether the plaintiff's claim arose from an injury to U.S. commerce or an injury to foreign commerce" (Br. 18-19), a result at odds with the plain text. Cf. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 109 (1993) (contrasting "to the extent" with "if," and concluding that conflating the two would be "at odds with the plain language").

Third, Clause 2 refers to a "claim under sections 1 to 7 of this Act," *i.e.*, a claim under the Sherman Act. If Congress intended to limit the right of particular parties to sue, it more naturally would have adopted a standing provision that, like the proviso, specifically addresses the plaintiff's injury. See *Kruman*, 284 F.3d at 396. Alternatively, Congress would have amended, or at least referenced, the Clayton Act. A plaintiff "has standing to enforce § 1 by virtue of § 4 of the Clayton Act." *Jefferson Parish Hosp. No. 1* v. *Hyde*, 466 U.S. 2, 5 n.1 (1984). But "[t]he FTAIA did not amend the Clayton Act." U.S. Br. 27.[22]

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[22] For example, Congress amended the Clayton Act to codify this Court's holding in *Pfizer* that foreign governments may sue under the Sherman Act, albeit for actual, not treble, damages. See 15 U.S.C. 15(b). And the several subsequent proposed bills that would have limited private plaintiffs' standing and remedies in foreign commerce cases have each been framed as amendments to the Clayton Act. See Foreign Trade Antitrust Improvements Act of 1985, S. 397, 99th Cong. (1985); Foreign Trade Antitrust Improvements Act of 1986, S. 2164, 99th Cong. (1986); Foreign Trade Antitrust Improvements Act of 1989, S. 50, 101st Cong. (1989). The provisions of these other bills, unlike the FTAIA, would "not be applicable to actions instituted by United States antitrust enforcement agencies." *Foreign Trade Antitrust Improvements Act of 1985: Hearings on S. 397 Before the Comm. on the Judiciary* (Hearings on S. 397), 99th Cong. 215 n.30 (1985) (A.B.A. Section of Antitrust Law Report on S. 397).

B. The House Report On Which Petitioners Rely Confirms That Congress Intended To Preserve The Claims Of Overseas Purchasers.

Petitioners' legislative history argument is premised on the FTAIA House Report. This reliance is misguided.

1. First, the House Report cannot provide sound support for petitioners' reading, because, when it was drafted, the *original* Clause 2 required that the effect on U.S. commerce be "the basis of the violation alleged." App., *infra*, 3a. In its *final* form, the statute instead requires simply that the U.S. effect "give rise to a claim" under the Sherman Act. As discussed in the preceding section, this language was adopted precisely to avoid the very implication petitioners now press. The final version clearly supports respondents' view, as indicated by floor statements of its sponsors after the change was made. See 128 Cong. Rec. 18,953 (1982) (Rep. Rodino) (FTAIA "retains full protection for *any person* injured by conduct that has a direct, substantial, and reasonably foreseeable *anticompetitive* effect on the domestic or import commerce of the United States" (emphases added)); *id.* at 27,385 (1982) (Rep. McClory) ("[FTAIA] place[s] jurisdictional limits on these laws so that they will not apply to our *export trade or to purely foreign trade* unless the conduct in question has a 'direct, substantial, and reasonably foreseeable' *anticompetitive* effect on our domestic commerce or on the commerce of exporters in the United States." (emphases added)).

2. Second, portions of the Report that petitioners omit demonstrate that even the *former* version of the statute did not support their view. First, the Report explains that "[a]ny major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction." App., *infra*, 22a. Petitioners' position also cannot be reconciled with the Report's explanation that Clause 2 was added in response to the A.B.A.'s comments to adopt the *National Bank of Canada* rule. See *supra* at 27. Nor is their construction consistent with the Report's repeated statements, starting with its very first sentence, that the FTAIA's sole purpose was "to promote American exports." App. *infra*, 4a.

Equally important, petitioners' position conflicts with the House Report's express adoption of *Pfizer*'s deterrence rationale. See 434 U.S. at 308; see also *supra* at 15. According to the House Report, Congress determined to "preserv[e] the rights of foreign persons to sue under our laws when the conduct in question has a *substantial nexus* to this country" (not merely when it occurs *in* this country) because – as this "Court pointed out in *Pfizer*" – the failure to do so could "so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons." App., *infra*, 17a (emphasis added). Congress thereby embraced the conclusion "that *foreign plaintiffs* should have *full rights* under United States antitrust laws where the challenged conduct affected domestic and foreign markets indiscriminately." WALLER, *supra*, § 9:9, at 9-26 to 27 (emphasis added).

3. Even the three snippets petitioners extract from the House Report in context undermine their reading and demonstrate that not even the original version of Clause 2 required that the plaintiff's injury arise in U.S. commerce.

First, petitioners quote the Report's statement, tracking the bill's language at the time, that the domestic "'effect' providing the jurisdictional nexus" serves as "the basis for the injury alleged." Br. 34. But the full quote reads:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from *conduct with no anticompetitive effects in the domestic marketplace*. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act amendments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. *This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States*, or, in the case of conduct lacking such an impact, on an export opportunity of a person doing business in the United States.

App., *infra*, 19a-20a (emphases added). Thus, the Report's reference to "the basis for the injury alleged" simply mimics the bill as it stood at the time, and "does not speak to the issue whether the particular plaintiff bringing the suit must have suffered an injury caused by the domestic anticompetitive effects of the conduct." *Kruman*, 284 F.3d at 400 n.8.

Next, petitioners quote a reference to the protections afforded to foreign purchasers "'in the domestic marketplace,'" contending that this means foreign purchasers are only protected if their injuries are "sustained in U.S. commerce." Br. 35 (quoting House Report at 10; App., *infra*, 17a). In fact, the full quote states:

> The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws conduct that does not have the requisite domestic effects. This test, however, *does not exclude all persons injured abroad* from recovering under the antitrust laws of the United States. A *course of conduct in the United States – e.g.*, price fixing not limited to the export market – would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The conduct has the requisite effects within the United States, even if some purchasers *take title abroad or suffer economic injury abroad*. Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.

App., *infra*, 17a (emphases added and omitted and citations omitted). The Report's reference to "the protection of our antitrust laws *in the domestic marketplace*" merely reflects the fact that the hypothetical being addressed by this passage concerns "[a] course of conduct *in the United States*." The full quote cannot support petitioners' inference that foreign plaintiffs are protected *only* "in the domestic marketplace" in other contexts – to the contrary, it makes clear that foreign plaintiffs are covered even if they "take title abroad or suffer economic injury abroad."

Finally, petitioners repeatedly invoke the phrase "wholly foreign transactions" in isolation (Br. 13, 33, 40) to offer a meaning that the full text refutes. The full quote states:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. Such foreign transactions should, for purposes of this legislation, be treated in the same manner as export transactions—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor. The Committee amendment therefore deletes references to "export" trade, and substitutes phrases such as "other than import" trade. It is thus clear that wholly foreign transactions, as well as export transactions are covered by the amendment, but that import transactions are not.

Br. App. 16a (emphasis added). This passage explains why the drafters extended the FTAIA's limitation on Sherman Act jurisdiction to "wholly foreign" commerce in addition to export commerce, distinguishing the Sherman Act's application to import commerce. And the quote's references to "transactions" means not individual retail *sales*, as petitioners suppose, but the *anticompetitive agreements* alleged to be unlawful. See *ibid* (citing as an example of a "wholly foreign transaction" the facts of *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (CADC 1968), in which two shippers entered into a conspiracy to exclude competitors). But in any event, the Report merely states that the FTAIA *applies* to wholly foreign transactions such that jurisdiction exists if Clauses 1 and 2 are satisfied, not (as petitioners would have it) that the FTAIA *excludes* them from the coverage of the Sherman Act.[23]

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[23] Petitioners' drive-by constitutional challenges are equally meritless. Congress's Foreign Commerce power extends to even wholly overseas conduct that is intended to affect, and does in fact affect, the U.S.; moreover, the scope of its commerce power turns on the *activity* regulated, not on which *plaintiffs* are challenging it. *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911). And not even petitioners' novel due process claim would lie here, for due process is satisfied if the defendants' conduct had foreseeable effects on U.S. commerce. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1245-48 (1992).

IV. As Direct Victims Of Petitioners' Worldwide Cartel, Respondents Have Suffered "Antitrust Injury" And Have "Antitrust Standing."

The question whether respondents satisfy the prudential "antitrust injury" and "antitrust standing" doctrines is entirely derivative of the question whether the Sherman Act applies to their claims. See *Den Norske*, 241 F.3d at 431 n.32. The anticompetitive conduct that is subject to the private right of action under the antitrust laws is co-extensive with the conduct that is subject to criminal prosecution. "As the courts have often noted, * * * the selfsame language of the Sherman Act provides for both criminal and civil sanctions, and for the full array of these penalties." 2 AREEDA ET AL., *supra*, ¶ 303a. The Clayton Act, in conferring a right to sue upon "*any* person injured by reason of anything forbidden in the antitrust laws" (15 U.S.C. 15(a) (emphasis added)), manifestly does not contemplate that *no* person would have the right to remedy acts that are illegal under the Sherman Act. Rather, the antitrust injury and standing doctrines seek to enhance the deterrent effect of the antitrust laws by identifying efficient antitrust enforcers.

Overseas direct purchasers are the *only* enforcers of the antitrust laws who may bring a claim challenging the illegal overseas acts of a worldwide cartel: U.S. *indirect* purchasers were not directly injured by the conspirators' sales, while all the U.S. *competitors* that otherwise might sue are, in fact, *co-conspirators*. Petitioners' argument would, for the first time, convert doctrines intended to identify the most efficient enforcers of the antitrust laws into a rule forbidding *any* enforcers from challenging patently unlawful activity. Such a perverse result has no basis in either law or logic, and any meritorious concerns petitioners raise regarding the scope of this litigation are instead properly resolved through doctrines such as comity, conflict of laws, and *forum non conveniens* that, as we have discussed, are not now before this Court.

A. Respondents Have Antitrust Standing Even Under Petitioners' Proposed Standards.

This case does not present an appropriate occasion to decide whether existing standing doctrine should be modified as petitioners propose. First, for the reasons described in Part I, *supra*, respondents' claims do, in fact, arise from the effects of petitioners' cartel on U.S. commerce. In sum, petitioners' fixing of U.S. prices, as well as their global market-division scheme, were critical to maintaining the cartel overseas. Had petitioners *not* included the U.S. in their cartel, respondents would have been able to purchase vitamins at competitive prices, and the cartel would have collapsed due to arbitrage. Petitioners' activities in the U.S. are thus the direct cause of respondents' injuries.

Second, reiterating that the antitrust laws are intended to protect U.S. consumers, petitioners suggest that standing should be limited to those claims that will further U.S. interests. Br. 43-45. Petitioners continue to "confuse[] the ultimate purposes of the antitrust laws with the question of who can invoke their remedies. The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations." *Pfizer*, 434 U.S. at 314.

As we have explained, in the case of global cartels, foreign purchasers' claims further U.S. interests. When a cartel is operating simultaneously here and abroad, the United States will benefit directly from the destruction of the cartel elsewhere, as arbitrage will allow U.S. purchasers to escape super-competitive U.S. cartel prices. And indeed, claims by foreign purchasers prevent cartel activity in the U.S.: if a cartel in a global market cannot operate worldwide, it will collapse. Furthermore, as this Court concluded in *Pfizer*, claims by foreign purchasers deter cartels from subsidizing the risks of liability in this country with their profits abroad. See *supra* at 13-19.

Pfizer itself notably held that the foreign plaintiffs in that case suffered "antitrust injury" and had standing. 434 U.S. at 315. And *Pfizer*, when applied to cartels, necessarily means that persons injured here and abroad may sue. As the A.B.A.'s International Law Section wrote in its resolution supporting the

FTAIA, "Because the antitrust laws would be fully applicable to such conduct, a plaintiff would retain the right to recover all damages caused by the effects of the restrictive conduct; *whether those effects fell within or without the United States.* As a result, there would be no incentive for a firm to offset domestic liability for restraints impinging on domestic commerce by engaging in coordinated conduct abroad." Hearings on H.R. 2326, *supra*, at 255 (emphasis added).

B. Petitioners' Proposed Standing Rule Is Inconsistent With This Court's Precedents And Congress's Intent.

1. Respondents Satisfy The Settled Requirements For Antitrust Standing.

Petitioners contend that their standing rule can be derived from this Court's statement in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), that antitrust injury is injury "'that flow[s] from that which makes defendants' acts unlawful.'" Br. 44. But as *Brunswick* and its progeny make clear, what makes actionable conduct "unlawful" is that it is anti-, not pro-, competitive; this Court has never suggested that standing turns on whether the injury arose from an effect on U.S. commerce. *Brunswick*, 429 U.S. at 489. See also, *e.g.*, *Atl. Richfield Co.* v. *USA Petro. Co.*, 495 U.S. 328, 338 (1990); *Cargill, Inc.* v. *Monfort*, 479 U.S. 104, 116 (1986). In this case, respondents unquestionably were injured by the anti-competitive effects of petitioners' conduct – namely, the super-competitive prices imposed by the unlawful cartel.

Indeed, the most analogous precedents of this Court reject petitioners' contention that a plaintiff's injury must arise from an effect on U.S. commerce. Petitioners argue that "[r]espondents' own injuries were not caused 'by reason of' an agreement in restraint of commerce 'among' the several states or 'with' foreign nations." Br. 42 (quoting 15 U.S.C. 1). That is simply not correct: the agreement that injured respondents – petitioners' *conspiracy* – indisputably operated in U.S. domestic and foreign commerce. There is no requirement that a plaintiff's *injury itself* arise from an effect on U.S. commerce. The logical consequence of petitioners' argument would be that a plaintiff's injury must arise from an effect on inter-, rather than intra-, state com-

merce, for the Sherman Act applies only to agreements affecting the former. See 1A AREEDA ET AL., *supra*, ¶ 273b (noting that the effects test "is not different in principle" from the "'affecting commerce' test for domestic jurisdiction"). This Court has rejected any such suggestion, however, instead permitting claims arising from wholly *intrastate* injury so long as the challenged conduct *also* has substantial interstate effects. See, *e.g.*, *Summit Health*, 500 U.S. at 330 (rejecting as irrelevant defendant's contention that "there is no factual nexus between the restraint on [plaintiff's local medical practice] and interstate commerce"); *McLain* v. *Real Estate Bd.*, 444 U.S. 232, 242, 246 (1980).

Petitioners also invoke the "antitrust standing" factors identified in *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 543 (1983). At bottom, the question is whether the plaintiff is an efficient enforcer of the antitrust laws, or instead asserts an injury that is too remote from the unlawful conduct. Relevant considerations include the directness of the injury suffered; whether it is speculative; judicial manageability; and the potential for multiple recoveries. *Ibid.* These factors do not support eliminating the recognition of foreign direct purchasers' non-speculative claims against a worldwide cartel, even if, as petitioners suggest, they may limit foreign claims in *other* international antitrust contexts. The United States thus seemingly concedes that respondents' claims "suffer none of the defects mentioned in *Associated General Contractors*." U.S. Br. 29 n.9.

When, as here, foreign and domestic customers suffer an identical injury from a single, integrated course of conduct, none of the *Associated General Contractors* considerations is implicated. Respondents' claims are not "remote," "indirect," or "speculative." See 459 U.S. at 543. And contrary to petitioners' hyperbolic assertions, respondents' claims present no prospect of an unmanageable drain on judicial resources. Respondents filed this suit as a companion case to the indistinguishable claims of plaintiffs who purchased vitamins for delivery in this country. The unlawful act – petitioners' conspiracy – is precisely the same in both cases. The plaintiffs' relationship to the petitioners – direct purchaser – is likewise identical. There is

furthermore a great overlap in the discovery to be undertaken; indeed, the overwhelming majority of the evidence necessary to establish the defendants' liability has already been collected. And in a cartel case such as this, respondents' claims require no special inquiry into foreign economic conditions or law, because the defendants engaged in "*per se* [antitrust violations]: market division, * * * consumer allocation, production limitations, and price fixing or price stabilization." 1 HAWK, *supra*, at 286 (Supp. 1996-1) (emphasis added).[24]

All told, foreign purchasers have brought suit against only a half-dozen cartels.[25] Each paralleled a federal prosecution that found the defendants' conduct – here *and abroad* – unlawful. And these claims have generally proceeded in tandem with the pending "domestic" claims.

The subtext of petitioners' argument is instead that this case will involve a great *many* plaintiffs. See, *e.g.*, Br. 44. That, of course, is entirely petitioners' own doing. They engaged in a gigantic scheme to bilk their customers out of billions of dollars and now hope to minimize the resulting liability. As this Court indicated in *Pfizer*, it is precisely the grandness of an illegal scheme like petitioners' that requires the firm application of the jurisdiction conferred in the Sherman Act. It is not a viable argument that *this case* is unmanageable, for some amount of

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[24] Compare Br. 27-28 (hypothesizing *other*, non-cartel cases involving "novel claims," disputes over "whether agreements directed at different countries constitute multiple narrow conspiracies or one broad conspiracy," and claims "where the challenged restraint is not a 'per se' violation [unlike] price-fixing"); U.S. Br. 23 (hypothesizing non-cartel claims involving disputes over "whether the challenged foreign conduct was part of some global conspiracy, whether that global conspiracy had the requisite effects on domestic commerce, and whether some third person was injured in United States commerce in such a way that gave rise to a claim").

[25] In addition to this case, *Kruman* (auction houses), and *Den Norske* (heavy-lift barges), respondents are aware of three other cartel cases: *Newco Trading Co.* v. *Ajinomoto Co., Inc. et al.*, No. 03-CV-8217 (S.D.N.Y.) (monosodium glutamate); *Latinoquimici-Amtex S.A.* v. *Akzo Nobel Chems. B.V.*, No. 03-CV-10312 (S.D.N.Y.) (sodium monochloroacetate); and *Ferromin Int'l Trade Corp.* v. *Ucar Int'l, Inc.*, C.A. No. 99-693 (E.D. Pa.) (graphite electrodes).

complex litigation is the inevitable consequence of the U.S.'s central role in an increasingly global economy, and established litigation devices such as class action procedures minimize the burden on our courts. This Court, in any event, has already concluded that manageability alone is not a ground for denying antitrust standing to persons, such as respondents, whose claims "promote the vigorous enforcement of the antitrust laws." *Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199, 214 (1990).

Indeed, petitioners' antitrust standing argument would *unravel* the doctrines this Court has crafted to preserve judicial manageability and effective antitrust enforcement. Petitioners' sales injured indirect purchasers in the United States, *i.e.*, purchasers of finished products that were manufactured overseas using cartelized vitamins. "[V]itamins manufacturers sell most of their output in dry powder form, eventually to be used for human and animal nutritional purposes in a wide variety of products, from vitamin pills, to feed for chicken, beef, and fish, to nutritional enrichment in numerous food products." Harry First, *The Vitamins Case*, 68 ANTITRUST L.J. 711, 712 (2001). Those finished products necessarily bore higher prices, because the cartel inflated the costs those manufacturers incurred for an important ingredient.

Such U.S. indirect purchasers are currently prohibited from bringing claims on the theory that a more efficient enforcer exists: namely, the direct purchasers. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 737-38 (1977). But if foreign direct purchasers' claims were forbidden, the injury to U.S. indirect purchasers who buy from them would stand without remedy, permitting violators to "retain the fruits of their illegality." *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). The resulting gap in the deterrent function of antitrust remedies could be filled only by a ruling that the *Illinois Brick* doctrine does not apply to indirect purchasers' claims if the direct purchasers are overseas. But *that* approach – which would permit U.S. indirect purchasers to bring claims – would be genuinely unmanageable,

requiring U.S. plaintiffs to prove the effects of an illegal cartel on each of the imported products they purchased.[26]

2. Congress Declined To Adopt The Restriction On Standing That Petitioners Propose.

Petitioners' proposed standing rule mirrors their theory of FTAIA jurisdiction; as explained *supra*, however, Congress squarely rejected such an approach. This case thus does not present a gap that Congress has left this Court to fill by changing the law of antitrust standing. The right of persons injured overseas to sue under our antitrust laws is a question that Congress has carefully considered. And it would be nonsensical to conclude that Congress in the FTAIA decided to preserve Sherman Act jurisdiction over claims by foreign purchasers for injuries cartels cause overseas, but simultaneously intended to eliminate those claims on standing grounds.[27]

a. Petitioners have not identified *any* pre-FTAIA decision of *any* court, and respondents are aware of none, holding that a person lacks standing merely because his injury did not arise from the effect of a Sherman Act violation on U.S. commerce. Instead, petitioners attempt to put the shoe on respondents' foot, asserting that, "[a]s of the time Congress enacted the FTAIA, no case had ever authorized claims arising from foreign transactions occurring wholly outside U.S. commerce." Br. 9. This assertion is wrong, for at the time Congress enacted the FTAIA, there had been several such cases.

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[26] Petitioners' suggestion that this case presents a third-party, or "derivative," standing problem (Br. 15-16) is not correct. Respondents' claims are based solely on their *own* injuries. Nor would courts, to determine the existence of jurisdiction, be required to adjudicate the merits of some hypothetical third party's claims. As we showed in Part III, *supra*, the requirement that the conduct give rise to "a claim" simply limits the Sherman Act to conduct causing anti-competitive effects in the United States – effects petitioners concede.

[27] To be clear, standing is not coextensive with Sherman Act coverage. Many foreign purchasers' claims would be excluded by this Court's traditional antitrust standing and injury doctrines: *e.g.*, speculative claims, claims by foreign indirect purchasers, and claims not arising from the defendant's anticompetitive actions.

Indeed, petitioners *themselves* cite such a case, and acknowledge that it is discussed in the House Report. In *Industria Siciliana Asfalti, Bitumi, S.p.A.* v. *Exxon Research & Engineering Co.*, No. 75-5828-CSH, 1977 U.S. Dist. LEXIS 17851 (S.D.N.Y. Jan. 18, 1977) (cited in Br. 31 n.7 and House Report at 5 (App., *infra*, 9a)), the plaintiffs were permitted to pursue a claim for injury "confined to Italy" and arising from an Italian contract. The court explained that

> the fact that the plaintiff's injury in this case has materialized in a foreign country, and been borne by a foreign corporation which does not directly engage in import from or export to the United States, is not a sufficient ground upon which to deny it antitrust protection. * * * [T]he foreign plaintiff is not without standing to cite the deleterious domestic effects in support of his own antitrust complaint.

Id. at *30-*31. See also, *e.g.*, *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (CA2), cert. denied, 434 U.S. 984 (1977) (defendants conspired to prevent plaintiff, an oil producer in Libya, from securing Libyan government contracts); *Dominicus Americana Bohio* v. *Gulf & Western Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979) (plaintiffs, mostly foreign corporations alleging no U.S. injury, had standing to challenge defendants' monopolization of tourist facilities in the Dominican Republic).[28]

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[28] Petitioners cite this Court's decision in *Matsushita*, *supra*, as supposedly holding that "private plaintiffs challenging [a] multinational conspiracy can seek redress only for injuries that occur 'in the American market.'" Br. 43 (quoting *Matsushita*, 475 U.S. at 584 n.7). In fact, the quoted phrase makes a factual, not legal, point: the plaintiffs in that case (U.S. electronics manufacturers) only claimed to suffer an antitrust injury "in the American market." The Court held that plaintiffs were required to prove that defendants "conspired to price predatorily in the American market" because the other behavior that they alleged (including some conduct in Japan), although anti-competitive, did not harm them. 475 U.S. at 584 n.7. *Matsushita* thus imposed no geographic requirement for standing. To the contrary, had the plaintiffs competed in Japan and been harmed by defendant's exclusionary behavior there, they clearly *would* have had standing, for they would have been injured in U.S. export commerce as a result of their inability to sell their goods abroad. See *Zenith*, 395 U.S. at 124-25.

b. Against the background of this case law, it is apparent that petitioners' point that "Congress made clear that it did 'not intend to alter existing concepts of antitrust injury or antitrust standing'" (Br. 42 (quoting House Report, at 11 (App., *infra*, 18a))) actually supports *respondents'* view: Congress preserved established law providing that foreign purchasers *could* sue for their overseas injuries. Congress expressly focused on the question of standing when it adopted the proviso, overruling cases that gave standing to foreign purchasers in cases involving only U.S. export commerce. The proviso's failure to cover non-export cases shows that Congress intended to preserve standing in such cases. Indeed, Congress *rejected* proposals that would have extended the proviso's limit on standing to non-export cases like this one. See *supra* at 28 & n.21.

After the FTAIA was enacted, Congress repeatedly revisited the same issue, and in each instance declined to change established standing law. Shortly after adopting the FTAIA, Congress amended the standing provision of the Clayton Act to codify this Court's holding in *Pfizer* that foreign governments may sue under the antitrust laws (albeit for single, not treble, damages). The amended statute imposed no limitation on where the injury must arise. 15 U.S.C. 15(b). And subsequently, Congress has considered the remedies available to private parties in international antitrust cases, but it has never even *considered* eliminating standing entirely for plaintiffs like respondents. And Congress has rejected even the more limited proposals.[29]

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[29] For example, the Foreign Trade Antitrust Improvements Act of 1985 would have amended the Clayton Act to require courts to apply the "jurisdictional rule of reason" in foreign competition cases. See Hearings on S. 397, *supra*. If a particular suit violated that standard, courts would have been required to award only single damages or, conceivably, dismiss the case. S. 397, *supra*, §§ 3, 4 (1985). Similar legislation was introduced in 1986 and 1989. S. 2164, Foreign Trade Antitrust Improvements Act of 1986, 99th Cong. (1986); S. 50, Foreign Trade Antitrust Improvements Act of 1989, 101st Cong. (1989). The Reagan Administration successfully *opposed* efforts to limit the treble-damages remedy in international cartel cases on the ground that such claims were essential to preserving the Sherman Act's deterrent effect. Hearings on S. 397, *supra*, at 22 (Charles F. Rule, Acting Ass't

V. The Other Arguments Of Petitioners' *Amici* Lack Merit.

Petitioners' *amici* finally urge this Court to narrowly construe the FTAIA for two reasons entirely extraneous to either the text or history of the statute: (i) to ensure the effectiveness of the government's leniency program; (ii) to preserve international comity. Both arguments lack merit.

A. The Government's Leniency Program Is Not A Justification for Misinterpreting the FTAIA.

The government asserts that permitting the claims of all cartel victims will discourage participation in its leniency program. U.S. Br. 19-21. This cannot inform this Court's construction of the FTAIA, for this leniency program has existed only "[s]ince 1993" (U.S. Br. 19), and thus could hardly have informed Congress's decisions respecting the FTAIA's scope more than a decade earlier. The government's contention is thus merely a bald policy overture, ungrounded in the FTAIA or any other statute. We address the matter briefly to show that for several reasons, the policy the government now espouses is a bad one.[30]

First, Congress is addressing the government's concern, but in a much more targeted way than the government's blunderbuss proposal here. The Senate Judiciary Committee has favorably reported an Administration-sponsored bill, the Antitrust Criminal Penalty Enforcement and Reform Act of 2003, which will greatly increase the penalties for Sherman Act violations but limit plaintiffs to actual damages with respect to those *particular defendants* that participate in the leniency program. H.R. 1086, tit. II, § 213(a), 108th Cong. (2003). The government's proposal here, by contrast, is both under- and over-inclusive. It would fail to immunize companies participating in the leniency pro-

A.G.); *id.* at 306 (James C. Miller, FTC Chairman); *id.* at 40 (Abraham Sofaer, Legal Adviser, U.S. Dep't of State).

[30] The government's citation (U.S. Br. 21) to *United States* v. *Borden Co.*, 347 U.S. 514 (1954), for the proposition that Congress intended the government to be the principal antitrust enforcer is simply misleading, for it ignores this Court's *conclusion* in *Borden* that "private and public actions were designed to be cumulative, not mutually exclusive," such that both forms of antitrust enforcement "may proceed simultaneously or in disregard of each other." *Id.* at 519.

gram from treble-damage liability for harms to U.S. consumers. But it would immunize cartel participants who do *not* participate in the leniency program. And it equally impugns the *foreign* private remedies the government now touts. *E.g.*, U.S. Br. 25.

Second, the government's argument is self-destructive – if accepted, it would undermine the leniency program. Most important, as already discussed, the FTAIA defines the *scope* of the Sherman Act and, as such, applies equally to prosecutors. If petitioners' position were correct, cartel activity abroad would be immune even from *injunctive* relief in a criminal enforcement action by the government. The contrary assumption, underlying the government's entire brief, that Clause 2 merely governs the standing of private parties to sue (see, *e.g.*, U.S. Br. 8 ("The FTAIA governs whether a federal court may hear *a plaintiff's complaint* alleging violations of the Sherman Act." (emphasis added)) is absolutely wrong. The FTAIA applies equally to "Sherman Act suits by the Department of Justice and private parties." App., *infra*, 14a. Indeed, Congress enacted the FTAIA to "provide assurances against private plaintiff[s] successfully proposing different standards than those employed by the Department of Justice." *Id.* 6a. See also S. CONF. REP. NO. 97-644, at 29-30 (1982) (FTAIA enacts "a jurisdictional threshold for enforcement actions"). When conduct does not satisfy the FTAIA's requirements, "private litigants have no right to recover damages under the Sherman Act, and the FTC and Justice Department are barred from bringing a civil or criminal action." John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 364 (1983). Thus, by exempting foreign cartel participants from liability in the U.S., the government's position would actually weaken its own leniency program, as such participants would have less to fear from U.S. prosecutors and would be even less inclined to apply.[31]

[31] Petitioners' reading of the FTAIA would equally undercut the deterrent value of the criminal fines imposed under U.S. law. Although petitioners' extensive presence in this country made it possible to base their fines on their domestic sales, the government has steadfastly maintained that "a court may consider the defendant's worldwide (U.S.

Furthermore, civil suits play a crucial role in cartel detection and deterrence. In this case, for example, "Class Plaintiffs uncovered the alleged conduct among bulk vitamins producers before the federal cooperation agreements became public and before any defendants confessed to their wrongdoing." Order, *In re Vitamins Antitrust Litig.*, Misc. No. 99-197, at 5 (Feb. 18, 2004). The same holds true generally: "*Many more violations* are likely to be detected if private parties have an interest in doing so than if government agencies, with their meager budgets, shoulder the burden alone." MIROW & MAURER, *supra*, at 226 (emphasis added) . The government's own experience shows that "cartel members did not fear detection by U.S. or foreign antitrust authorities. In fact, they literally laughed at the very idea of it." Scott D. Hammond, Dir. Of Crim. Enf., Speech of Sept. 12, 2000, at 8. The government has seen "over and over" the "contempt and utter disregard that the members of the cartel typically have for antitrust enforcement." James M. Griffin, Dep. Ass't A.G., Speech of Apr. 6, 2000, at 6.[32]

Third, the government has repeatedly rejected the very argument it advances here, maintaining that civil liability does not discourage participation in this program because reduced criminal exposure provides all the incentive that is needed. Applicants typically save hundreds of millions of dollars in fines (between $800 million and $2.1 billion for lead petitioner Hoffmann-La Roche, for example) and – perhaps most important – avoid jail time. See James M. Griffin, Speech of Aug. 12, 2003,

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and foreign) sales in the calculation when the amount of U.S. commerce affected * * * understates * * * the impact of the defendant's conduct on American businesses and consumers." DOJ ICPAC Final Report, *supra*, at 169 n.24. But if petitioners' reading were accepted, a cartel's overseas activity would be *lawful* under the Sherman Act and therefore presumably could not form the basis of any criminal fine.

[32] This case is a perfect illustration. The lead petitioner brazenly continued its central role in this cartel even after pleading guilty to participating in a worldwide citric acid cartel. "Instead of being deterred, top-level HLR executives orchestrated false statements to enforcement authorities, took steps to further conceal the firm's illegal activities, and continued to lead the world's other producers in a global cartel." Hammond, Dir. of Crim. Enf., Speech of Sept. 12, 2000.

at 8; Scott D. Hammond, Dir. of Crim. Enf., Speech of Mar. 8, 2001, at 8; *Interview with* [Dep. Ass't A.G.] *Gary Spratling*, *supra*, at 11; Gary Spratling, *Cartel Roundtable, The Architects of Enforcement*, 6 GLOBAL COMPETITION REV. 25 (2003).

B. The Exercise Of Jurisdiction Over A Worldwide Cartel Does Not Offend Comity.

We explained *supra* at 6 that this case does not present the question whether this or any other international antitrust case should be dismissed on comity grounds, for comity was never invoked nor addressed in the lower courts. Although petitioners' *amici* press the issue, their arguments establish that this case raises *no* substantial issue of comity because – as petitioners effectively concede (Br. 23) – cartels are uniformly condemned by international competition laws. "For decades, there were vigorous disputes in international fora about whether it made sense to prohibit cartel behavior by private firms. That debate has been resolved, in this country and elsewhere." R. Hewitt Pate, Acting Ass't A.G., Speech of May 16, 2003, at 2. For example, the U.N. Conference on Trade and Development and OECD condemn hard-core cartels. DOJ ICPAC Final Report, *supra*, 185.[33]

For that reason, invocations of comity here are substantially weaker than those unsuccessfully advanced by the defendants in *Hartford Fire*. In that case, the defendants' conduct – which took place entirely in the U.K. – was "perfectly consistent with British law and policy" (509 U.S. at 799); on that basis, four Justices dissented (*id.* at 819-21 (Scalia, J., dissenting)). Here, by contrast, cartel activity is broadly condemned.

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[33] Without elaboration, petitioners assert that in *McCulloch* v. *Sociedad Nacional de Marineos de Honduras*, 372 U.S. 10 (1963), *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1958), and *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), "differences in sovereign policies regarding available remedies prompted the Court to construe the federal statutes as inapplicable." Br. 22. But these cases do not address differences in *remedies* for illegal conduct; rather, they address a concern specific to maritime law, namely the need to protect shippers from constantly changing *substantive legal obligations* as the ships pass through foreign waters. These cases simply apply the long-established rule that the law of a ship's flag state governs the legal duties of those aboard toward one another.

Petitioners' argument is furthermore surpassingly overbroad. Rather than allowing for the case-specific application of comity concerns, petitioners would redefine the scope of the Sherman Act *across the board* just because in *some* cases the antitrust laws apply to *some* activities simultaneously regulated by *some* other nations. Petitioners' jurisdictional exclusion would apply to U.S. defendants (including those in this case) no less than foreign ones, even though only the latter raise comity concerns. Furthermore, any comity concerns with respect to the great many states that have anti-cartel laws but do not enforce them (see *supra* at 17 & n.14) are overborne by the unprecedented and illogical gap in antitrust enforcement petitioners would create. Whatever the result under doctrines such as comity, conflict of laws, and *forum non conveniens* with respect to claims that involve sales in countries that provide effective class-based private rights of action, the ongoing emergence of competition policies overseas cannot be said to have broadly abrogated the settled "effects" principle as petitioners propose.

But even limited to its own terms, petitioners' argument merely demonstrates the existence of *overlapping* jurisdiction over their cartel – a common phenomenon – not a conflict that precludes exercising Sherman Act jurisdiction. "Exercise of jurisdiction by more than one state may be reasonable – for example, * * * when one state exercises jurisdiction over activity in its territory and the other on the basis of the effect of that activity in its territory * * *." RESTATEMENT § 403 cmt. d. The right to exercise jurisdiction is limited to one nation only in a narrow circumstance: "only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible." *Id.* § 403 cmt. e. Overlapping jurisdictional regimes are also a valuable tool for deterring cartel behavior: "multiple enforcers create a higher probability of detection, successful investigation, and a complete package of punishment that reflects the global effects of the unlawful conduct." Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113, 135-36 (2000).

With respect to this case specifically, the exercise of U.S. antitrust jurisdiction over petitioners' cartel is clearly reasonable and comports with comity. "Any agreement in restraint of United States trade that is made outside the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce." RESTATEMENT § 415(2). As noted, the United States purchases more bulk vitamins than any other nation. And in the parallel suits brought by domestic purchasers, petitioners have admitted to conducting numerous meetings in the United States in furtherance of their conspiracy.[34]

Indeed, not only are cartels uniformly condemned in international law, but the U.S. "effects" principle has gained widespread acceptance in the cartel context. RESTATEMENT § 402, rptrs. notes ("This basis for jurisdiction is increasingly accepted for regulation of restrictive business practices, particularly in the European Community * * *."). "When there is the most blatant form of conspiracy in restraint of trade, a horizontal price-fixing agreement between competitors, the antitrust regimes of the world are united in the view that it does not matter that the smoke-filled rooms where the plots are hatched are abroad." Russell J. Weintraub, *Globalization's Effect on Antitrust Law*, 34 NEW ENG. L. REV. 27, 28 (1999). For example, E.U. officials may "recommend fines up to 10 percent of a violator's *global*

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[34] That this case does not offend comity is also illustrated by the government's prosecution of petitioners for their conduct here and abroad. "In applying the principle of reasonableness, the exercise of *criminal* (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as *particularly* intrusive." RESTATEMENT § 403 rprts. notes (emphases added); see also *id.* cmt. f. The fact that the U.S. government determined both that petitioners overseas activities fell within the scope of the Sherman Act (apparently recognizing the intertwined nature of the global vitamins market) and also that the exercise of jurisdiction over petitioners' cartel would not offend comity is thus a strong indication that this civil suit is equally appropriate.

annual sales in all its product lines." CONNOR, *supra*, at 85 (emphasis added).

Also instructive is the British High Court's decision in *Provimi* v. *Aventis Animal Nutrition SA*, [2003] E.C.C. 29. Appearing here as an *amicus*, the U.K. describes *Provimi* as a case in which "[p]ersons *injured* by the vitamin cartel *in the United Kingdom* were allowed to sue British subsidiaries in the UK courts for private damages." U.K. Br. 4 (emphases added). In fact, as explained by the current Assistant Attorney General for Antitrust, the claims in *Provimi* were "made on behalf of a German subsidiary that purchased vitamins from a German subsidiary of one of the cartel members," and the High Court "ruled that plaintiffs could sue a U.K. subsidiary of the defendant cartel member for the damages alleged to have been suffered in Germany, even though the damages relate to trade with the German subsidiary of the defendant." Pate, Acting Ass't A.G., Speech of May 16, 2003, at 13. And the Deputy Head of the E.C.'s Competition Directorate explains that "the English court, like the Court of Appeals for the District of Columbia Circuit [in this case], granted jurisdiction for an injury suffered *outside its territory*." Woods, *supra*, at 8 (emphasis added).

The substance of the comity arguments advanced by petitioners' *amici* is thus directed not at the exercise of Sherman Act jurisdiction over worldwide cartels, but instead at the extraterritorial exercise of jurisdiction over other forms of anti-competitive conduct abroad, such as monopolies, mergers, and allegations of unfair trade practices. See, *e.g.*, Pet. Br. 23 ("Although price-fixing is widely proscribed, *other* commercial activities that may be prohibited under U.S. law may be permissible under foreign law." (emphasis added)). In those other contexts, where international norms and standards differ, comity principles may have substantial force. They have none in the case of worldwide cartels, which are condemned in essentially every jurisdiction. RESTATEMENT § 415, cmt. e.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 15, 2004

APPENDIX

STATUTES

1. Section 1 of the Sherman Act (15 U.S.C. 1) provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal.

2. The Foreign Trade Antitrust Improvements Act of 1982 (15 U.S.C. 6a) provides in relevant part:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

3. Section 4 of the Clayton Act (15 U.S.C. 15) provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

97TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
NO. 97-686

FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982

AUGUST 2, 1982. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 5285]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5235) to amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to exclude from the application of such Acts certain conduct involving exports, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Foreign Trade Antitrust Improvements Act of 1982".

AMENDMENT TO SHERMAN ACT

SEC. 2. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

"SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce), with foreign nations unless—

"(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

"(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

"(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

"(2) such effect is the basis of the violation alleged under this Act. [page 2]

If this Act applies to such conduct only because of the operation of paragraph (1) (B), then this Act shall apply to such conduct only for injury to export business in the United States.".

AMENDMENT TO CLAYTON ACT

SEC. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end thereof the following undesignated paragraph:

"This section shall not apply to the formation or operation of any joint ventured limited to commerce, other than import commerce, with foreign nations.".

AMENDMENT TO FEDERAL TRADE COMMISSION ACT

SEC. 4 Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by adding at the end thereof the following new paragraph:

"(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

"(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

"(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

"(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

"(B) such effect is the basis of the violation alleged under this subsection. If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.".

Amend the title so as toread:

A bill to amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to exclude from the application of such Acts certain conduct involving trade with foreign nations.

I. PURPOSE

H.R. 5235 is one of several bills introduced in the 97th Congress that seek to promote American exports. A number of considerations provide the basis for this legislation. First is the apparent perception among businessmen that American antitrust laws are a barrier to joint export activities that promote efficiencies in the export of American goods and services. Second, courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists. H.R. 5235 addresses these problems of perception and definition by clarifying the Sherman Act and the antitrust proscriptions of the Federal Trade Commission Act to make explicit their application only to conduct having a "direct,

substantial, and reasonably foreseeable effect" on domestic commerce or domestic exports. The bill will also clarify Section 7 of the Clayton Act to make explicit its inapplicability to the promotion and operation of export and foreign joint ventures.

Passage of H.R. 5235 will not be a panacea for the many problems that may be afflicting American export trade. Assertions that the antitrust laws have had any significant negative impact on exports are at best speculative. Nonetheless, H.R. 5235 will achieve several objectives. First, H.R. 5235 will encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services. Second, enactment of a single, objective test—the "direct, substantial, and reasonably foreseeable effect" test—will serve as a simple and straightforward clarification of existing American law and the Department of Justice enforcement standards. A clear [page 3] benchmark will exist for businessmen, attorneys and judges as well as our trading partners.

II. SUMMARY OF THE REPORTED BILL

H.R. 5235, as reported, contains four sections. Section 1 sets forth the short title: the "Foreign Trade Antitrust Improvements Act of 1982." Section 2 amends the Sherman Act, 15 U.S.C. §§ 1, *et seq.*, by adding a new Section 7 that makes the Sherman Act inapplicable to conduct involving trade or commerce with foreign nations, other than import transactions, unless there is a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, or the export opportunities of a domestic person. Section 3 amends Section 7 of the Clayton Act, 15 U.S.C. § 18, to make it inapplicable to the formation or operation of joint ventures limited to commerce with foreign nations, other than import commerce. Section 4 amends the antitrust (*i.e.*, unfair methods of competition) aspect of Section 5 (a) of the Federal Trade Act, 15 U.S.C. § 45 (a), to conform to Section 5 of the FTC Act to the Sherman Act amendment contained in Section 2 of H.R. 5235.

III. Background

A. Procedural History of H.R. 5235

On March 4, 1981, Chairman Rodino and Congressman McClory introduced H.R. 2326, the Foreign Trade Antitrust Improvements Act of 1981, the forerunner of H.R. 5235. The bill was referred to the Committee on the Judiciary, and, in turn, to the Subcommittee on Monopolies and Commercial Law.

The Subcommittee held three days of hearings on the international application of the United States' antitrust laws, H.R. 2326, and related bills. Testifying on March 26, 1981, were Malcolm Baldridge, Secretary of Commerce; Professor Eleanor M. Fox of the New York University School of Law; Mr. A. Paul Victor of the law firm of Weil, Gotshal & Manges; Mr. David N. Goldsweig, an attorney experienced in international antitrust issues, practicing with the General Motors Corp.; and Professor James A. Rahl, Owen L. Coon, Professor of Law at Northwestern University. Testifying on April 8, 1981, were Mr. John H. Shenefield of the law firm of Milbank, Tweed, Hadley & McCloy and a former Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice; Mr. James R. Atwood of the law firm of Covington & Burling and former Deputy Assistant Secretary and Deputy Legal Adviser in the United States Department of State; and Mr. Martin F. Connor, Washington Corporate Counsel of the General Electric Co., who testified on behalf of the Business Roundtable. Finally, testifying on June 24, 1981, were Gordon O. F. Johnson, Chairman, LogEtronics, Inc.; Mr. Thomas M. Rees, a former Member of Congress and an attorney familiar with export issues; and Mr. Fred Emery, a former Director of the Federal Register.

On December 10, 1981, the Subcommittee unanimously approved an amendment to H.R. 2326 in the nature of a substitute, which was introduced as H.R. 5235, cosponsored by all twelve Members of the Sub-[page 4]committee. On May 18, 1982, by

unanimous voice vote, the full Committee reported H.R. 5235 with an amendment in the nature of a substitute.

B. Need for Legislation

1. Business perception that antitrust laws prohibit legitimate joint activity

Some testimony in the hearing record suggests that the United States is doing well as an exporter and that whatever problems that might exist are not caused by our antitrust laws. *See e.g.*, Prepared statement of Professor James A. Rahl, dated March 26, 1981 ("Rahl Statement"), at 3–4.

This view is borne out by a July 1980 report to the Congress prepared by the Office of the United States Trade Representative and the Department of Commerce. The report found that the three government policies that most discourage United States exports are taxation of Americans employed abroad, uncertainties about enforcement of the Foreign Corrupt Practices Act, and export control regulations. The Report specifically stated that while antitrust laws were of concern of businessmen. "No specific instances were shown of these laws unduly restricting exports." Professor Rahl testified that, far from hindering our export efforts, American antitrust laws have been a major factor in ridding the world of many international cartels and enhancing domestic competition, both factors in improving our overall export performance. Rahl Statement at 7–9.

There is, however, evidence that a perception exists among businessmen, especially small businessmen, that antitrust law prohibits efficiency-enhancing joint export activities. For example, Secretary Baldridge testified that antitrust assurances were necessary to encourage small- and middle-sized exporters to increase their exports. Prepared Statement of Honorable Malcolm Baldrige, dated March 26, 1981, ("Baldrige Statement"), at 5–7; Hearing Transcript of March 26, 1981, at 44–45. Professor Fox, Mr. Victor, Mr. Goldsweig and Mr. Shenefield also acknowledged a perception of the

antirust laws as a hindrance in joint export activities. Hearing Transcript of March 26,1981, at 51, 57; Prepared Statement of Professor Eleanor M. Fox, dated March 26, 1981 ('Fox Statement"), at 2–3; Prepared Statement of Mr. A. Paul Victor, dated March 26, 1981 ("Victor Statement"), at 3–4; Prepared Statement of Mr. David N. Goldsweig, dated March 26, 1981 ("Goldsweig Statement"), at 2; Prepared Statement of Mr. John H. Shenefield, dated April 8, 1981 ("Shenefield Statement"), at 1–2. As Mr. Shenefield stated, "[i]t is an article of orthodoxy in the business community that the antitrust laws stand as an impediment to the international competitive performance of the United States. Specifically, it is believed that the antitrust laws hinder our export performance. . . ." Shenefield Statement at 1–2. And the Section of Antitrust Law of the American Bar Association mentions the "*perception* of some American businessmen that the United States antitrust laws prohibit certain exporting activities. . . ." American Bar Association, Section of Antitrust Law, *Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading*, dated October 26, 1981 ("Antitrust Section Report") at 22 (emphasis in original). [page 5]

2. *Uncertainty in the Verbal Formulation of the Nature and Quantum of Effects That Are Necessary To Create Jurisdiction Under the Antitrust Laws*

The hearing record suggests a second, related problem—possible ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction. Since Judge Learned Hand's opinion in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945), it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies.[1] There remains, however, some disparity among

[1] *See Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690, 704-05 (1962); *Steele v. Bulova Watch Co.* 344 U.S. 280 (1952).

judicial interpretations and between those interpretations and executive enforcement policy regarding the quantum and nature of the effects required to create jurisdiction.

Alcoa itself contemplated a test based upon whether the international transaction was intended to affect domestic commerce and whether it actually did so. 148 F.2d at 443–44. Following the lead of *Alcoa* and its subsequent judicial interpretations, the Department of Justice announced its view in 1977 that the United States antitrust laws should be applicable to an international transaction "when there is a substantial and foreseeable effect on the United States commerce," and that it would be a miscarriage of Congressional intent to apply the Sherman Act to "foreign activities which have no direct or intended effect on United States consumers or export opportunities. . . ." United States Department of Justice, Antitrust Division, *Antitrust Guide to International Operations* 6–7 (1977).

Recently, however, in private actions under the antitrust laws, the courts have arrived at different formulations of the nature and quantum of "effects" needed. For example, in *Todhunter-Mitchell & Co.* v. *Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1074), the court looked to whether the conduct "directly affect[s] the flow of foreign commerce into or out of this country". In *Waldbaum* v. *Worldvision Enterprises, Inc.*, 1978–2 Trade Case (CCH) Para. 62,378, at 76,257 (S.D.N.Y. 1978), the court asked whether there were "anticompetitive effects in the United States. . . ." In *Industria Siciliana Asfalti, Bitumi, S.P.A.* v. *Exxon Research & Engineering Co., et al.*, 1977–1 Trade Cas. (CCH) Para. 61,256, at 70,784 (S.D.N.Y. 1977), the court required a showing of an "impact upon United States commerce." And, in *Dominious Americana Bohio* v. *Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979), the court stated that "it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not *de minimus*." See also *Timberland Lumber Co.* 1. *Bank of America, N.T. & S .A.*, 549 F.2d 613 (9th Cir. 1976); *Mannington Mills,*

Inc. v. *Congoleum Corp.*, 595 F.2d 1287, 1291–92 (3rd Cir. 1979); *National Bank of Canada* v. *Interbank Card Ass'n.*, 666 F.2d 6, 8 (2d. Cir. 1981).

The precise effect of these varying formulations is disputed. Some commentators believe there are few, if any, differences in the results. An ABA Antitrust Section analysis has concluded that, despite the variations in wording, "there is, with rare exception, no *significant* [page 6] inconsistency between judicial precedents and the Justice Department's view of the effects test." Antitrust Section Report at 10 (emphasis in original).

Other commentators view the matter differently. For example, the Business Roundtable believes that "[j]udicial decisions are rife with inconsistencies regarding the types of effects on the domestic economy that must be demonstrated in order to establish U.S. antitrust jurisdiction over an international transaction." Prepared Statement of Mr. Martin F. Connor, dated April 8, 1981 ("Roundtable Statement"), at 6–7; *see* Goldsweig Statement at 2–6. The Roundtable goes on to note that "[t]he commentators are also divided on the correct test to apply. . . ." *Id.* at 7.

The Committee need not choose between these competing views to conclude that legislative clarification is appropriate. First, as a practical matter, businessmen and antitrust practitioners often consider American antitrust law an unnecessarily complicating factor in a fluid environment in which prompt decisionmaking may be critical. As the Business Roundtable has stated, "antitrust considerations typically enter the picture long before a business transaction is explored in depth. If these considerations indicate problems, the possible transaction may die on the drawing board well before negotiations are commenced." Roundtable Statement at 6; *see* Baldridge Statement at 6. A single, clear standard can reduce the amount of legal research and analysis that will be necessary to make an accurate

prediction to whether United States antitrust laws "indicate problems."

Second, even if different formulations have not led to divergent results, the possibility of divergence in results certainly exists. Presumably a *de minimus* standard creates a lower threshold than a "substantial effects" test. Indeed, in some cases a different result might not only be possible but compelled. Businessmen and antitrust counsel cannot safely ignore the current differences in formulation. *See* Goldsweig Statement at 4. H.R. 5235 will provide assurances against private plaintiff's successfully proposing different standards than those employed by the Department of Justice.

Finally, at a time when international trade plays an immense and increasingly important role in the economy, it is appropriate for Congress to formulate a standard to be applied uniformly throughout the federal judicial system. A single standard will allow consistent precedent to develop by providing more definite touchstones to guide the parties and the courts. As the Business Roundtable has concluded, "no legitimate purpose is served by perpetuating uncertainty on this fundamental question."

CONGRESSIONAL RESPONSE

Over the past few years, public debate has focused on two approaches for removing uncertainty that may now exist concerning the jurisdiction of the United States antitrust laws. The first, embodied in various export trading company bills such as S. 734, H.R. 1648 and H.R. 1799 as introduced, contemplates an amendment to the Webb Pomerene Act, 15 U.S.C. §§ 61, *et seq.*, to provide a procedure whereby persons seeking to engage in joint export activity would apply to the Department of Commerce for antitrust certification. The Department, after inter-[page 7]agency consultation with the Department of Justice and the Federal Trade Commission, would issue applicants a certificate that purports to exempt designated joint activities from the antitrust laws. During the Subcommittee hearing process,

many of the witnesses criticized these "certification" proposals as excessively bureaucratic, ineffective, and even counterproductive. On July 27, 1982, the House passed H.R. 1799 with Committee amendments so that the bill does not amend the Pomerene Act and creates a certificate procedure in the Department of Justice. See. H.R. Rep. 97–637, pt. 2.

The second approach, a straightforward clarification of the antitrust laws, was originally embodied in H.R. 2326. H.R. 2326 contained only two substantive sections. The first provided that the Sherman Act "shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the United States or has the effect of excluding a domestic person from trade or commerce with such foreign nation." The second section provided that Section 7 of the Clatyon Act "shall not apply to joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation."

As Chairman Rodino stated in introducing the bill, H.R. 2326 would allow "American firms greater freedom when dealing internationally while reinforcing the fundamental commitment of the United States to a competitive domestic marketplace. . . . [T]he uncertainty of antitrust constraints has remained a strong concern of potential exporters; that concern is remedied by this bill." 127 Cong. Rec. H. 779 (daily ed. March 4, 1981). Mr. McClory, a co-author of this legislation, explained that H.R. 2326

> squarely addresses the complaint voiced by American exporters and potential exporters that their actions are inhibited by uncertainty regarding the scope and effect of our antitrust laws, and it does so without a bureaucratic apparatus which would confer antitrust immunity at an uncertain cost in Government redtape and possible anticompetitive domestic effects. By clarifying the law, it will especially help those

> small- and medium-size businesses which many are convinced have the greatest potential for making a significant contribution to the volume of our export trade.
>
> * * * * * * *
>
> This legislation will send to the export business community the clear signal that it appears to need in order for it to compete with greater confidence and freedom of action in the international marketplace, and it should also help to deter unjustified private and government actions against exporters. (*Id.*)

The specific purpose of the Sherman Act modification is:

> to more clearly establish when antitrust liability attaches to international business activities. The Sherman Act prohibits restraints of trade or commerce with foreign nations. [*See, e.g.*, Sections 1 & 2, 15 U.S.C. §§ 1 & 2, which apply to "trade or commerce among the several States or with foreign nations."] This bill will establish that restraints on export trade [page 8] only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States or a domestic firm competing for foreign trade. ((*Id.*) (Remarks of Chairman Rodino).)

The modifications to Section 7 of the Clayton Act are necessary because:

> The Supreme Court has held that Section 7 of the Clayton Act applies to joint ventures when the participants form a separate corporation and purchase the new venture's stock. Section 7 prohibits acquisitions that may substantially lessen competition and attacks potentially anticompetitive market concentration in its incipiency. Businessmen must, therefore, exercise caution when forming such ventures. This bill would exempt joint ventures that are limited to export trading.
>
> This does not mean that export-related joint ventures are

free of all antitrust restrictions. They remain subject to the Sherman Act, but the stringent "incipiency" standard of section 7 would not apply. (*Id.*)

D. EVOLUTION OF H.R. 2326 TO H.R. 5235

During and after the hearings on H.R. 2326, a number of experts, after expressing strong support for its basic concepts, suggested improvements. As a result, the Subcommittee and the Committee made changes in the bill, the most important of which are discussed below.

1. Inclusion of the Federal Trade Commission

Several witnesses pointed out that, although H.R. 2326 would provide assurances against Sherman Act suits by the Department of Justice and private parties, it supplied no similar protection against actions brought by the Federal Trade Commission. Fox Statement at 6; Goldsweig Statement at 9–10; Shenefield Statement at 9; Roundtable Statement at 10–11. The amendment in the nature of a substitute that the Subcommittee approved in December, 1981, included a new section that made a change in Section 5(a) of the Federal Trade Commission Act parallel to that made in the Sherman Act. The Subcommittee amendment alters only the antitrust coverage of Section 5(a) of the FTC Act; the consumer protection jurisdiction of Section 5(a) is left untouched.

2. Addition of the requirement that effects "reasonably foreseeable"

Some witnesses and commentators also suggested the need to alter H.R. 2326 to make clear that the effects upon domestic commerce or a domestic export opportunity must be foreseeable:

> A significant source of business uncertainty when engaging in foreign commerce is the possibility that an unpredictable, remote or indirect impact on U.S. commerce, determined after the fact, could result in a firm being subjected to U.S. antitrust jurisdiction. The Justice Department in its *Antitrust Guide* takes the position that only "foreseeable" effects

> on U.S. commerce should result in U.S. antitrust jurisdiction. *Accord, United States* v. *Aluminum Company of America,* 148 F.2d 416, 444 (2d. Cir. 1945) (Goldsweig Statement at [page 9] 11; *see* Shenefield Statement at 10; Roundtable Statement at 12–13).

Because the ultimate purpose of this legislation is to promote certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions, the Subcommittee amendment makes explicit that the effect on domestic commerce or export opportunities must be "reasonably foreseeable." The Subcommittee chose a formulation based on *foreseeability* rather than *intent* to make the standard an objective one and to avoid—at least at the jurisdictional stage—inquiries into the actual, subjective motives of defendants. An intent test might encourage ignorance of the consequences of one's actions, which in this context, would be an undesirable result.

The objective nature of the jurisdictional test is also evident from use of the term "reasonably," which was added through an amendment of Mr. Butler. "Reasonably" connotes not only objectivity, but practicality as well. The test is whether the effects would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown.

This provision should free businessmen and their advisors from having to worry unduly about effects that are highly unlikely, but it does not permit them effectively to turn from the reasonably foreseeable consequences of their actions.

Once the effects of a course of conduct are felt, the test remains an objective one, but a defendant confronted with evidence that his past conduct has had direct and substantial effects within this country could not argue that continued effects of this type flowing from similar future conduct were not "reasonably foreseeable."

3. Imports and Purely Foreign Transactions

Some observers raised questions about the status of import transactions under H.R. 2326 and urged the Subcommittee to make clear that the legislation had no effect on the application of antitrust laws to imports. As Mr. Atwood stated, "it is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law." Prepared Statement of Mr. James R. Atwood, dated April 8, 1981. ("Atwood Statement"), at 14; *see* Rahl Statement at 10; Antitrust Section Report at 31. To remove any possible doubt, the Subcommittee amendment (H.R. 5235, as introduced) modified the legislation to make clear that it applied only to "export" trade.

The desirability of another change soon became apparent. The Subcommittee's "export" commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations. *See, e.g., Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect [page 10] on domestic commerce or a domestic competitor. The Committee amendment therefore deletes references to "export" trade, and substitutes phrases such as "other than import" trade. It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not.

With these changes, H.R. 5235 achieves an important objective of freeing American-owned firms that operate entirely abroad or in United States export trade from the possibility of dual and conflicting

antitrust regulation. When their activities lack the requisite domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors. To be sure, if the foreign state in question has an antitrust regimen, American-owned firms must still comply. But no longer is there any possibility that, because of uncertainty growing out of American ownership, such firms will be subject to a different and perhaps stricter regimen of antitrust than their competitors of foreign ownership.

4. Conduct Having a Foreign Impact

The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—*e.g.*, price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer Inc., et al* v. *Government of India, et al*, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do. Indeed, to deny them this protection could violate the Friendship, Commerce and Navigation treaties this country has entered into with a number of foreign nations.

There are other reasons for preserving the rights of foreign persons to sue under our laws when the conduct in question has a substantial nexus to this country. As the Supreme Court pointed out in *Pfizer*, *supra*, 434 U.S. at 314–315, to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons.

While H.R. 5235 preserves antitrust protections in the domestic marketplace for all purchasers, regardless of nationality or the situs of the business, a different result will obtain when the conduct is solely export-oriented. Thus, a price-fixing conspiracy directed solely to exported products or services, absent a spillover effect on the domestic marketplace (see pt. E(2), *infra*), would normally not have the requisite effects on domestic or import commerce. Foreign buyers injured by such export conduct would have to seek recourse in their home courts.

If such solely export-oriented conduct affects export commerce of another person doing business in the United States, both the Sherman and FTC Act amendments preserve jurisdiction insofar as there is injury to that person. Thus, a domestic exporter is assured a remedy [page 11] under our antitrust laws for injury caused by unlawful conduct of a competing United States exporter. But a foreign firm whose non-domestic operations were injured by the very same export oriented conduct would have no remedy under our antitrust laws. This result is assured by the Committee's inclusion of the final sentence in the Sherman and FTC Act amendments. It limits recovery for conduct that has no requisite domestic effects, other than the effects on the export commerce of another person doing business in the United States, to such person.

5. *Type of Domestic Impact*

As explained more fully (see pt. E(1), *infra*), in providing that the federal courts may assert the jurisdiction of the United States antitrust laws if conduct affects the export trade or export commerce "of a person engaged in such trade or commerce in the United States," the Committee does not intend to alter existing concepts of antitrust injury or antitrust standing. This bill only establishes the standards necessary for assertion of United States antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiffs' claim would remain unchanged.

For example, the mere fact that an exporter may be adversely affected in a financial sense by the activities of another would not necessarily man that he has sustained an injury for which he may recover under Section 4 of the Clayton Act. *See*, e.g., *Illinois Brick Co.* v. *State of Illinois*, 431 U.S. 720 (1977); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

For similar reasons, the domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. *See*, e.g., *National Bank of Canada* v. *Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981). For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by providing a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind.

According to the International Law Section of the American Bar Association, the legislation as reported by the Subcommittee, before amendment by the Committee, could have been read as ignoring

> whether conduct has an adverse effect on competition. This result not only departs from the weight of scholarly opinion, but would produce perverse results. Under such an interpretation, conduct which has an anticompetitive effect which impinges only on defendants located in foreign nations and which has a neutral or procompetitive domestic effect would be subject to the antitrust laws. (American Bar Association, Section of International Law, *Report on Purposes and Provisions of H.R. 5235*, at 9.)

The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act

amend[page 12]ments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States, or, in the case of conduct lacking such an impact, on an export opportunity of a person doing business in the United States.

6. *Clayton Act Amendments*

Some comments in the record suggest that the original amendment to Section 7 of the Clayton Act, as expressed in H.R. 2326, was susceptible to misinterpretation. As originally drafted, the amendment applied to "joint ventures limited solely to export trading. . . ." The concerns raised about this language centered on, first, whether the parents of the joint ventures would be included in the exemption; second, whether incidental activities necessary to engage in joint export activities would be covered by the exemption; and finally, whether export joint ventures that themselves entered into mergers or acquisitions might not be unintentionally exempted from the proscriptions of Section 7. *See* Antitrust Section Report at 32–33; Roundtable Statement at 17–18; Atwood Statement at 18.

The Committee amendment, which states that Section 7 of the Clayton Act "shall not apply to the formation or operation of any joint venture . . .", is intended to address all these concerns. First, by making clear that it is the *conduct* of *forming* and *operating* the joint venture and not the joint venture itself that is protected, the amendment removes any disparity between the joint venture and its parents and makes plain that joint ventures that engage in merger activity that joint ventures that engage in merger activity are not exempted are not exempted by the amendment. Second, by making clear that the operation of the joint venture falls within the amendment, and not merely

the exporting or foreign activity itself, the amendment affords protection to the incidental activities of the joint venture. In order to be exempted from Section 7 of the Clayton Act, however, the incidental activities must have a strong and direct relationship to the primary export or foreign activity.

The full Committee corrected another potential problem with the Subcommittee version of the Section 7 amendment, which was limited to joint ventures involved solely in export commerce. As reported by the full Committee, the amendment applies to commerce with foreign nations, other than import commerce. Thus, joint ventures involved solely with export commerce, or other forms of foreign commerce with no import nexus to the United States, will be outside the coverage of Section 7 of the Clayton Act. For example, a joint venture could not only export goods from the United States, but also produce or market goods in foreign nations, and still enjoy the exemption from the incipiency standard of the Clayton Act.

E. OTHER ISSUES

During the proceedings on H.R. 5235, two other significant issues were raised, which the Committee did not feel necessitated changes in the legislation. [page 13]

1. *Effect of Legislation and Current Law*

A very important question is the effect of the legislation on current antitrust law. It is the intent of the sponsors of the legislation and the Committee to address only the subject matter jurisdiction of United States antitrust law in this legislation. H.R. 5235 does not affect the legal standards for determining whether conduct violates the antitrust laws, and thus the substantial antitrust issues on the merits of a claim would remain unchanged.

Moreover, the bill is intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the

courts' ability to employ notions of comity, *see*. e.g., *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 1287 (3rd Cir. 1979), or otherwise to take account of the international character of the transaction. Similarly, the bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist or to the extraterritorial pursuit of evidence in appropriate cases. *See* Atwood Statement at 7 n. 7.

2. *International Cartels*

Probably the most important criticism of the legislative concept of H.R. 5235 came from Professor Rahl, who feared the legislation could be misinterpreted as a legislative approval for American firms to engage in the type of international cartel activity prevalent before World War II:

> [P]erhaps most unfortunate of all is the risk that this provision would encourage American firms not only to form cartels among themselves but to participate in foreign and international cartels. . . . Past experience indicates that a serious risk would then arise of a secret agreement to include the United States in the market allocation to round things out. (Rahl Statement at 11.)

The Committee, after weighing this and similar arguments carefully, does not believe the legislation will result in a rejuvenation of international cartels. Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a "spillover" effect on commerce within this country—by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices—the cartel's conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce. The Committee would expect the Department of Justice and the Federal Trade Commission to continue their vigilance concerning cartel activity and to use their enforcement powers appropriately.

In addition, the Committee recognized the increased sensitivity of other nations to antitrust considerations and cartel activity. By more precisely defining the subject matter jurisdiction of U.S. antitrust law, H.R. 5235 in no way limits the ability of a foreign sovereign to [page14] act under its own laws against an American-based export cartel having unlawful effects in its territory. Indeed, the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets. *See* Atwood Statement at 6–8.

IV. The Provisions of H.R. 5235

H.R. 5235, the Foreign Trade Antitrust Improvements Act of 1982, contains three substantive provisions that amend the Sherman Act, Section 7 of the Clayton Act and the antitrust aspects of Section 5(a) of the Federal Trade Commission Act to clarify the limits of these provisions in reaching certain export and foreign activities.

Section 1 of H.R. 5235 states the short title. Section 2 amends the Sherman Act, 15 U.S.C. § 1, *et seq.*, by adding a new Section 7 to the Sherman Act. The intent of the new Section 7 is to establish that the proscriptions of the Sherman Act do not apply to export or purely foreign commerce unless the conduct has a direct, substantial and reasonably foreseeable anticompetitive effect on domestic or import commerce, or a domestic export opportunity.

Section 3 of H.R. 5235 amends Section 7 of the Clayton Act, 15 U.S.C. § 18, to exempt the formation and operation of joint ventures limited to export or purely foreign trade. This Section is intended only to remove the "incipiency" standard of Section 7 of the Clayton Act.

Section 4 amends the Federal Trade Commission Act to make it clear that the antitrust proscriptions of Section 5(a), 15 U.S.C. 45 (a), apply only to methods of competition that have a direct, substantial and reasonably foreseeable effect on domestic or import commerce, or

a domestic export opportunity. This amendment is intended to parallel the Sherman Act amendment. As noted above, this amendment does not affect the FTC's consumer protection jurisdiction.

V. Information Submitted Pursuant to Rules

1. *Budget Statement*

Clause 2(1) (3) (B) of House Rules XI is inapplicable because this legislation does not provide new budgetary authority or increased expenditures.

2. *Cost Estimate*

The Committee concurs with the estimate provided by the Congressional Budget Office and adopts that estimate as the cost estimate of the Committee for the purpose of clause 7(a) of House Rule XIII. Pursuant to clause 2(1)(3)(C) of House Rule XI, set out is the estimate of the Director of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., May 27, 1982.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 5235, the Foreign Trade Antitrust Improvements Act of 1982, [page 15] as ordered reported by the House Committee on the Judiciary, May 18, 1982.

The bill amends the Sherman, Clayton, and Federal Trade Commission Acts in restating or limiting the extraterritorial reach of the U.S. antitrust laws. It is expected that no significant additional cost to the government will be insurred as a result of enactment of this legislation.

Sincerely,
Alice M. Rivlin, *Director.*

3. *Inflationary Impact Statement*

Pursuant to clause 2(1)(4) of House Rule XI, the Committee estimates that this bill will not have an inflationary impact on prices and costs in the operation of the national economy.

4. *Oversight Findings*

The Subcommittee on Monopolies and Commercial law of this Committee exercises oversight responsibilities with respect to the antitrust laws. The favorable consideration of this bill was recommended by the Subcommittee. The Subcommittee will monitor developments under this legislation.

No findings or recommendations of the Committee on Government Operations were received as referred to in House Rule XI, clause 2(1) (3) (D).

VI. Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

Sherman Act

* * * * * * *

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce), with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and [page 16]

(2) such effect is the basis of the violation alleged under this Act.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

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SECTION 7 OF THE CLAYTON ACT

SEC. 7. That no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the

effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired. [page 17]

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transaction duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

This section shall not apply to the formation or operation of any joint venture limited to commerce, other than import commerce, with foreign nations.

SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Sec. 5. (a) (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect is the basis of the violation alleged under this subsection.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

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[page 18]

ADDITIONAL VIEWS OF CHAIRMAN RODINO

I intend to offer H.R. 5235 under suspension of the House Rules with one minor clarification in Sections 2 and 4, which amend the Sherman and FTC Acts. The reported version requires that the effect upon domestic commerce or domestic export opportunity be "the basis of the violation alleged. . . ." As explained more fully in the Committee's Report, the Committee added this language to make it absolutely clear that the basis of American antitrust jurisdiction has to be a domestic *anticompetitive* effect.

I believe that it is possible to improve the language of the Committee's version by substituting the phrase "such effect gives rise to a claim" under the provisions of the Sherman or FTC Act. The substituted language accomplishes the same result as the Committee version and is better, in my view, because the Committee language may suggest that an effect, rather than conduct, is the basis for a violation.

PETER W. RODINO.